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# The Oedipus Hex: Regulating Family After Marriage Equality

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# The Oedipus Hex: Regulating Family After Marriage Equality

Courtney Megan Cahill\*

*Now that national marriage equality for same-sex couples has become the law of the land, commentators are turning their attention from the relationships into which some gays and lesbians enter to the mechanisms on which they — and many others — rely in order to reproduce. Even as one culture war makes way for another, however, there is something that binds them: a desire to establish the family. This Article focuses on a problematic manifestation of that desire: the incest prevention justification. The incest prevention justification posits that the law ought to regulate alternative reproduction in order to minimize the potential for accidental incest between individuals involved in the donor conception process. A leading argument offered by both conservatives and progressives in defense of greater regulation of alternative reproduction, the incest prevention justification hearkens back in troubling ways to a taboo long used in American law to discipline the family. That justification is problematic not just in theory, but also in fact: it could catalyze regulation that radically reforms the fertility industry, producing adverse effects on the only way in which thousands of persons each year are able to have children and become parents.*

*This Article uses the incest prevention justification as an opportunity to consider the scope of a marriage equality precedent — specifically, how, and to what extent, such a precedent will affect the law of alternative reproduction, a largely unregulated field. Even before the Supreme Court ruled in favor of marriage equality in June 2015, scholars were considering the impact that a marriage equality precedent could have in domains outside of marriage. This Article furthers that inquiry by*

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\* Copyright © 2015 Courtney Megan Cahill. Donald Hinkle Professor of Law, Florida State University College of Law. For illuminating comments and conversations, I thank Doug NeJaime, Manuel Utset, Shawn Bayern, Germaine Gurr, Wayne Logan, and Marc Spindelman. Thank you also to Antonia Wong and her fellow editors at the *UC Davis Law Review* for their outstanding editorial assistance.

considering marriage equality's potential impact on the regulation of procreation. Its narrow objective is to argue that reproductive regulation that flows from incest anxiety is both normatively undesirable and constitutionally deficient; the logic that fueled marriage discrimination for decades — the logic of the incest taboo — ought not, and likely cannot as a constitutional matter, be grafted onto the law of alternative reproduction. Its broader objective is to show that while marriage inequality might be a thing of the past, at least for same-sex couples, its animating logic persists in the way that we think about sexuality, parenthood, and the family.

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## INTRODUCTION

Alternative reproduction has become the new frontier in the continuing culture wars over the family.<sup>1</sup> Prominent marriage traditionalists are turning their attention from same-sex marriage to it, arguing that the time has come to stop obsessing over marriage between same-sex partners and to start taking a more critical look at the ways in which they — and many others — reproduce.<sup>2</sup> Even as one culture war makes way for another, however, there is something that binds them: a desire to establish the family. This Article's focus is on a problematic manifestation of that desire: the incest prevention justification, a leading argument offered in defense of radical reform of alternative reproduction law and one that hearkens back in troubling ways to a taboo long used in American law to discipline the family.

A few years ago, marriage traditionalists predicted that the law's recognition of same-sex marriage would lead the country down a slippery slope to incest.<sup>3</sup> Today, conservative and progressive thinkers

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<sup>1</sup> See A. James Rudin, *The Coming Culture War over Fertility Technology*, WASH. POST (July 19, 2012), [http://www.washingtonpost.com/national/on-faith/the-coming-culture-war-over-fertility-technology/2012/07/19/gJQAsbeRwW\\_story.html](http://www.washingtonpost.com/national/on-faith/the-coming-culture-war-over-fertility-technology/2012/07/19/gJQAsbeRwW_story.html). Alternative reproduction is defined as the panoply of ways that persons conceive and bear children through assisted means, including alternative insemination, third party gamete (egg and sperm) donation, in vitro fertilization, and surrogacy. This Article's focus is on third party gamete donation and suggested reforms of it.

<sup>2</sup> See, e.g., David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), <http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html> (exhorting gay marriage opponents to abandon the fight against marriage equality and take up the question of “whether both gays and straight people should think twice before denying children born through artificial reproductive technology the right to know and be known by their biological parents?”); see also *infra* notes 32–34 and accompanying text.

<sup>3</sup> See Courtney Megan Cahill, *Same Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1544–45 (2005) [hereinafter *Same Sex Marriage, Slippery Slope Rhetoric*] (summarizing the claim that the legal recognition of same sex relationships will lead inevitably to the legal recognition of consensual incest). The slippery slope “from same sex marriage to incest” argument was recently made by Justice Sotomayor in oral arguments in *Hollingsworth v. Perry*. See Transcript of Oral Argument at 46–47, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12–144); David Weigel, *Ben Carson vs. Sonia Sotomayor, Round Zero*, SLATE (Mar. 29, 2013), <http://www.slate.com/blogs/weigel/2013/03/29/ben-carson-vs-sonia-sotomayor-round-zero.html>. The “slippery slope to incest” formulation was also a stock feature of radical racists’ arguments against miscegenation. See *infra* notes 158–68 and accompanying text. Finally, incest emerged during oral argument in *Obergefell v. Hodges*, when Justice Samuel Alito asked Solicitor General Donald Verrilli whether the law ought to treat same sex couples any differently than it does “unmarried siblings.” Transcript of Oral Argument at 33, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos.

alike — including David Blankenhorn (on the conservative side) and law professor Naomi Cahn (on the progressive side) — warn that the law's failure to regulate alternative reproduction could precipitate "accidental incest" between blood-related individuals.<sup>4</sup> Described as a "pervasive [fear] in the reproductive world"<sup>5</sup> and a "growing concern within industry watchdog groups,"<sup>6</sup> accidental incest is offered as not just a reason but the best reason<sup>7</sup> to pass laws that significantly alter the practice of alternative reproduction as it currently exists in the United States, including laws abolishing gamete donor anonymity<sup>8</sup> and laws mandating caps on gamete donation.<sup>9</sup> Other countries have

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14 556, 14 562, 14 571, 14 574).

<sup>4</sup> See *infra* notes 43–53 and accompanying text. The phrase "accidental incest" has been used by various actors to describe the dangers allegedly associated with unregulated alternative reproduction. See Naomi Cahn, *Accidental Incest: Drawing the Line or the Curtain? For Reproductive Technology*, 32 HARV. J.L. & GENDER 59, 59–60 (2009) [hereinafter *Accidental Incest*]; Libby Purves, *Whose Body Is It, Anyway? Yours, Naturally*, TIMES (Eng.) (Jan. 15, 2008), <http://www.thetimes.co.uk/tto/opinion/columnists/libbypurves/article2043028.ece>. While commentators are increasingly advertent to the potential for accidental incest between persons involved in alternative reproduction as a reason to regulate it, the relationship between incest and alternative reproduction is not new. See *infra* note 70 and accompanying text. The late professor and former head of the President's Council on Bioethics, Leon Kass, argued that reproductive cloning would lead to knowing incest between parents and their clones. See *infra* note 163. Similarly, in the relatively early days of alternative insemination, commentators warned that anonymous sperm donation would lead to accidental incest. See Martin Curie Cohen, *The Frequency of Consanguineous Matings Due to Multiple Use of Donors in Artificial Insemination*, 32 AM. J. HUM. GENETICS 589, 590 (1980); see also *infra* note 174 and accompanying text.

<sup>5</sup> Cahn, *Accidental Incest*, *supra* note 4, at 60 & n.3.

<sup>6</sup> *Id.* at 60 n.3; Steven Kotler, *The God of Sperm*, L.A. WKLY. (Sept. 26, 2007), [http://www.laweekly.com/2007\\_09\\_27/news/the\\_god\\_of\\_sperm/](http://www.laweekly.com/2007_09_27/news/the_god_of_sperm/).

<sup>7</sup> See NAOMI CAHN, *THE NEW KINSHIP: CONSTRUCTING DONOR CONCEIVED FAMILIES* 117 (2013) [hereinafter *NEW KINSHIP*] (arguing that "incest provides an excellent example or case study to use in pushing for wider regulation of the industry" and that "incest is one of the key, driving issues for disclosure").

<sup>8</sup> See *id.* at 129 (discussing the necessity for disclosure of donors to offspring and addressing potential steps toward legislation); Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 413 (2012) [hereinafter *The New Kinship*] (arguing that "federal and state law should provide for limited disclosure of the donor's identity once offspring turn eighteen" and that such laws should "preempt private agreements . . . to the contrary"); Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203, 203–06 (2009) [hereinafter *Necessary Subjects*] (advocating federal legislation that would abolish gamete donor anonymity and establish a national mandatory donor registry and presenting the need for such a registry, including accidental incest prevention).

<sup>9</sup> CAHN, *NEW KINSHIP*, *supra* note 7, at 105, 155 (advocating limits on gamete donations).

passed such laws (in order to minimize the threat of incest) and the United States ought to as well, critics contend.<sup>10</sup> A failure to do so, they argue, could result in an “[i]ncest [e]pidemic,”<sup>11</sup> a situation where “one donor . . . populate[s] the world”<sup>12</sup> and where “genetically related offspring . . . marry each other”<sup>13</sup> by mistake.

This Article refers to these incest-motivated arguments in favor of greater regulation of alternative reproduction as the incest prevention justification. It contends that that justification warrants serious attention for several reasons, including its potential to catalyze legal reforms of alternative reproduction that have debilitating effects on its multiple users — single women, heterosexual couples, and sexual minorities — and their offspring.<sup>14</sup> In addition, and more pressing here, the incest prevention justification is allied with a taboo whose principal purpose and effect are to establish the traditional family. The incest prevention justification’s establishment function is alone reason to reject it, especially considering that the “traditional nuclear family — where mom is married to dad and they are raising their biological kids — is no longer the norm in America.”<sup>15</sup> Beyond its troubling normative implications, the incest prevention justification is constitutionally deficient because it reflects and reproduces a way of thinking about the family that courts in marriage equality cases are rapidly discrediting. The same logic that has been used to justify marriage discrimination in the past ought not — and likely cannot, as

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<sup>10</sup> Currently, no state in the United States prohibits gamete donor anonymity or places caps on the number of successful gamete donations. Several countries, including England, Austria, and Spain, prohibit gamete donor anonymity and/or have instituted mandatory caps on gamete donation. Incest has played a role in some of those countries’ decisions to pass those regulations. See, e.g., DEPARTMENT OF HEALTH & SOCIAL SECURITY, REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY, 1984, Cm. 9314, at 26–27 (U.K.), available at [http://www.hfea.gov.uk/docs/Warnock\\_Report\\_of\\_the\\_Committee\\_of\\_Inquiry\\_into\\_Human\\_Fertilisation\\_and\\_Embryology\\_1984.pdf](http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf) (discussing accidental incest concerns and recommending mandatory caps on the number of successful gamete donations in England in order to minimize those concerns).

<sup>11</sup> Rachel East, *Fertility Clinics Could Cause an Incest Epidemic in America: Lack of Regulation on Sperm Donation Leads to One Man Fathering 150 Children*, MORTON REP. (Sept. 8, 2011), <http://www.themortonreport.com/discoveries/stranger/are-fertility-clinics-going-to-cause-an-incest-epidemic/>.

<sup>12</sup> Cahn, *The New Kinship*, *supra* note 8, at 412.

<sup>13</sup> *Id.*

<sup>14</sup> For a discussion of these effects, see *infra* Part I.B.

<sup>15</sup> William N. Eskridge, Jr., *Family Law Pluralism: The Guided Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1883 (2012).

a matter of constitutional law — be grafted onto the law of alternative reproduction.

On its face a straightforward argument, the incest prevention justification partakes of a taboo whose purpose and effect are familial establishment. A long line of theorists have shown that the incest taboo is not about preventing consanguineous unions and their possible genetic consequences, but about establishing traditional sex and family roles. For instance, in an influential essay published in 1975, feminist philosopher Gayle Rubin argued that “incest taboos . . . cannot be explained as having the aim of preventing the occurrence of genetically close matings.”<sup>16</sup> Rather, she contends there, the incest taboo is fundamentally concerned with establishing normative gender roles, sexual identity, and familial identity.<sup>17</sup>

Writers both before and after Rubin also elaborated on the incest taboo’s establishment dimension. One of the twentieth century’s most famous expositors of the incest taboo, Claude Lévi-Strauss, argued that the incest taboo was responsible for establishing no less than society itself.<sup>18</sup> More recently, philosopher Judith Butler has argued that a primary function of the taboo — and of the legal arguments that depend on it — is to establish a certain kind of family “as the only intelligible and livable one[.]”<sup>19</sup> Butler’s analysis, which is considered at greater length below,<sup>20</sup> is particularly useful in explaining why incest anxiety tends to surface when non-traditional familial structures press for legal recognition, as it did in the nineteenth century when inter-racial couples sought the right to marry and again in the twentieth and twenty-first centuries when same-sex couples sought relationship recognition.<sup>21</sup> As she explains, it is during moments of familial transformation and contestation when the need to establish what counts as “family” is at its height.

A taboo that both in theory and in fact is routinely deployed to establish the traditional family ought to arouse skepticism, particularly given its past role in establishing the intra-racial and opposite-sex family. No less concerning, though, are the constitutional implications of using the incest taboo to reform the law of alternative reproduction.

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<sup>16</sup> Gayle Rubin, *The Traffic in Women: Notes on the “Political Economy” of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 157, 183 (Rayna R. Reiter ed., 1975).

<sup>17</sup> See *id.* at 199.

<sup>18</sup> See *infra* notes 131–36 and accompanying text.

<sup>19</sup> JUDITH BUTLER, *ANTIGONE’S CLAIM: KINSHIP BETWEEN LIFE AND DEATH* 70 (2000) [hereinafter *ANTIGONE’S CLAIM*].

<sup>20</sup> See *infra* Part III.A.

<sup>21</sup> See *infra* Part III.B.

Contemporary marriage equality jurisprudence — and especially the wave of pro-marriage-equality decisions that has swept the nation since the Supreme Court’s 2013 landmark ruling in *United States v. Windsor*<sup>22</sup> — stands for the obvious proposition that the federal Constitution protects a right to marry and prohibits marriage discrimination against gays and lesbians.<sup>23</sup> But as scholars are increasingly recognizing, those decisions “do not simply expand access to the institution of marriage.”<sup>24</sup> Rather, or in addition, they stand for a much larger and more radical proposition, namely, that the federal Constitution prohibits the state from privileging families that conform to its preferred domestic paradigm — heterosexual, dual-gendered, biological parenthood — and from punishing families that deviate from it. In addition, these cases stand for the proposition that the Fourteenth Amendment protects not just the fundamental right to marry, but also, in the words of the Court of Appeals for the Tenth Circuit, the fundamental right to “*establish a family*.”<sup>25</sup>

This Article contends that laws predicated on the incest taboo, including laws curtailing alternative reproduction that might be passed on incest prevention grounds, are in tension with the trend in American constitutional law toward greater familial autonomy. It argues that to allow incest anxiety to inform (and reform) the law of

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<sup>22</sup> 133 S. Ct. 2675 (2013) (striking down section 3 of the Defense of Marriage Act under the Fifth Amendment’s Due Process Clause). For federal appeals courts that have struck down marriage equality bans, see, for example, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated*, 133 S. Ct. 2652 (2013). For federal district courts that have struck down marriage equality bans, see, for example, *Latta v. Otter*, 19 F. Supp. 3d 1054 (D. Idaho 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014), *rev’d*, 772 F.3d 388 (6th Cir. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014). For courts that have upheld marriage equality bans since *Windsor* was decided in 2013, see *DeBoer v. Snyder*, 772 F.3d 388, 402–03, 418 (6th Cir. 2014), *rev’d*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 919 (E.D. La. 2014), *recalled*, Nos. 13 5090 C/W, 14 97, 14 327, 2015 WL 4090353 (E.D. La. 2015).

<sup>23</sup> Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 827 (2014) (stating that “[c]ourts in the recent marriage cases have held that state action that enforces [a] single, heterosexual model of the family violates gays’ and lesbians’ equality interests *and their liberty interests*” (emphasis added)).

<sup>24</sup> *Id.* at 828.

<sup>25</sup> *Kitchen*, 755 F.3d at 1199 (emphasis added) (holding that “the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state’s marital laws”).



alternative reproduction would be to maintain the logic that informed marriage inequality for decades — specifically, the logic of familial establishment. That logic, this Article shows, has recently been rejected by courts as inconsistent with contemporary constitutional norms and values about intimate and family life and incompatible with the fundamental right to “establish a family.”<sup>26</sup> Most notably, that logic was rejected by the United States Supreme Court in its landmark marriage equality case *Obergefell v. Hodges*.<sup>27</sup> The *Obergefell* majority not only recognized that same-sex couples had for years been “establish[ing] families,”<sup>28</sup> but also reinforced strong constitutional norms of familial disestablishment and familial choice. “[C]hoices concerning . . . family relationships,” the majority declared, “are protected by the Constitution”;<sup>29</sup> like “decisions concerning marriage,” the majority continued, decisions about family “are among the most intimate that an individual can make.”<sup>30</sup> Beyond creating a national marriage equality precedent, then, *Obergefell* renders uncertain the validity of all laws that establish the family — including regulatory regimes, both within and beyond the alternative reproductive context, that derive from a taboo whose primary purpose is familial establishment.

While skeptical of all justifications for regulating alternative reproduction that hearken back to marriage inequality, this Article is especially concerned with the incest prevention justification. Not only is it a leading rationale offered by commentators in favor of greater regulation of the fertility industry, but it is also the one whose normative objective is largely unseen, appearing on its face to be a biologically-driven response — a response, that is, to the genetic consequences of accidental incest between donor-conceived kin — to the considerable expansion of alternative reproduction in the United States.<sup>31</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2599.

<sup>30</sup> *Id.*

<sup>31</sup> In this sense, the incest prevention argument is of a piece with arguments from other legal contexts — abortion, marriage equality — that similarly blend biological and normative reasoning. See, e.g., Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1511 (2013); Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 83, 83–84 (2013) [hereinafter *Marriage, Biology*]; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 265–66 (1992).

Perhaps most troubling, though, is the fact that the incest prevention justification has garnered support on the right and the left alike, thus making its codification into law largely uncontroversial, and intersects with a phenomenon that warrants critique: the use of alternative reproduction law to establish the traditional family. David Blankenhorn, erstwhile marriage equality foe who recently shocked the world by coming out in favor of same-sex marriage, has exhorted fellow conservatives to “get[] in front of the issue” of same-sex marriage by controlling the meaning and scope of a marriage equality precedent to further traditionalist ends.<sup>32</sup> As Cary Franklin explains, Blankenhorn and other traditionalists are attempting to control the import of a marriage equality precedent by “constructing a narrative about same-sex marriage that [will] shape its cultural and constitutional meaning for generations to come.”<sup>33</sup> In creating that narrative, Blankenhorn has chosen to focus on marriage, procreation, and parenthood — and, in particular, on the desired relationship between marriage and biological parenthood.<sup>34</sup>

As this Article demonstrates, invoking incest as a reason to regulate procreation and parenthood is in many ways integral to Blankenhorn’s traditionalist project. Gayle Rubin once wrote that the incest taboo “dominate[s] our sexual lives, our ideas about men and women, and the ways we raise our children.”<sup>35</sup> Given the taboo’s past role in shoring up prohibitions of non-traditional relationships that provoked societal discomfort, it is unsurprising that it has surfaced as one of the dominant rationales for regulating non-traditional methods of family formation. Its emergence in contemporary debates over alternative reproduction reminds us that while official marriage inequality has ended, at least for same-sex couples,<sup>36</sup> its animating logic persists in the way that we think about sexuality, parenthood, and the family.

This Article proceeds as follows. Part I provides a more detailed overview of the incest prevention justification and considers the legal reforms that it could help to catalyze. Part II proposes a conceptual shift, from thinking about the incest prevention justification in terms of genetics and biology to thinking about it in terms of family norms.

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<sup>32</sup> DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 1 (2007).

<sup>33</sup> Franklin, *supra* note 23, at 822.

<sup>34</sup> See *infra* notes 183–87 and accompanying text.

<sup>35</sup> Rubin, *supra* note 16, at 199.

<sup>36</sup> For instance, notwithstanding Chief Justice John Roberts’ suggestion that *Obergefell* paves the way for plural marriage, *Obergefell*’s narrow holding applies to same sex couples, not to multi party relationships. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2621–22 (2015) (Roberts, C.J., dissenting).

More specifically, this Part elucidates the incest prevention justification's weaknesses and uses them as an opportunity to question the normative work that argument is doing in contemporary debates over alternative reproduction. Where Part II introduces that question, Parts III and IV answer it by using legal history and theory to argue that the contemporary incest prevention justification, like its antecedents and like the incest taboo more generally, is being used to establish a normative conception of the family, one that necessarily includes two biological parents of different sexes and that is bound by "the genetic tie."<sup>37</sup> Part V uses the insights made and the conclusions drawn in the two previous Parts to appraise — and reject — alternative reproduction's incest prevention justification on both normative and constitutional grounds.

#### I. THE NEW KINSHIP MEETS AN OLD TABOO

This Part explains alternative reproduction's incest prevention justification as well as its potential consequences. Section A sets forth that justification and Section B considers its far-reaching potential, including the legal reforms that it could help to catalyze and the significant costs that it could impose on those individuals who rely on alternative reproduction as a method of family formation.

##### A. *The Incest Prevention Justification*

The contemporary incest prevention justification derives from a concern about the relative lack of regulation that marks the fertility industry.<sup>38</sup> Alternative reproduction has been legal in the United States

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<sup>37</sup> Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 211 (1995) (providing "an alternative vision of the genetic tie, inspired by definitions of self, family, and community in Black American culture, that recognizes genetic bonds without giving them the power to devalue and exclude other types of relationships").

<sup>38</sup> See CAHN, *NEW KINSHIP*, *supra* note 7, at 23 (noting that as a general matter "[t]he medical profession is typically regulated by the states or is self regulated through physicians' professional organizations, not by the federal government"); *id.* at 27 (recognizing that "there is no top down governance" in the fertility industry specifically); NAOMI R. CAHN, *TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION* 25 (2009) [hereinafter *TEST TUBE FAMILIES*] (discussing the lack of state and federal regulation of the fertility industry and advocating greater regulation of it); DEBORA SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 5 (2006); Vanessa L. Pi, *Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 379 (2009) (observing that "[p]resently, there is a serious lack of meaningful regulation over and accountability on the part of sperm banks").

for over fifty years,<sup>39</sup> and has remained largely unregulated by state governments and the federal government during that time. Most of the regulations that do exist apply to the health-related and safety-related aspects of gamete donation rather than to the actual procedures involved in alternative procreation.<sup>40</sup> Moreover, those regulations are concerned exclusively with what happens before, rather than after, gamete donation.

For instance, the federal government requires sperm and egg banks to follow certain safety, training, and educational standards, including the mandatory screening and testing of all gamete providers (and their products) for communicable diseases like HIV and Hepatitis B. It does not, however, require that donors reveal their identity to the children and to the families that they help to create.<sup>41</sup> Nor does it require donors to report health information to clinics, or clinics to report health information to donor-conceived children. Finally, no regulatory body places mandatory caps on the number of times that any one

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<sup>39</sup> See Gaia Bernstein, *The Socio Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1083-97 (2002) [hereinafter *Socio Legal Acceptance*] (explaining how alternative insemination became legalized in the 1960s). As Bernstein notes, “[t]he trend of legalization and its consequent direct modification of family law concepts to accommodate the technology of AI [artificial insemination] continued through the 1970s” with the passage of the Uniform Parentage Act (“UPA”) of 1973, which “provided that AID with the husband’s consent is legal and further that the donor is not perceived to be the natural father.” *Id.* at 1090. Notwithstanding the UPA’s passage (and modification in 2000), legal issues continue to surround the use of alternative insemination by lesbians and unmarried women, as most states’ alternative insemination protection extends only to married women in a heterosexual relationship. See *id.* at 1106; see also Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1178-79 (2010) (stating that “[d]espite . . . data indicating that increasing numbers of unmarried women both gay and straight are having children through ART, the relevant parentage statutes in the vast majority of states address only children born to heterosexual married couples”); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty First Century*, 5 STAN. J. C.R. & C.L. 201, 203 (2009) (discussing the absence of legal protection for unmarried female users of alternative insemination and proposing a model law that would protect that group based on a District of Columbia statute).

<sup>40</sup> As Cahn puts it: “The FDA guidelines are somewhat limited; they do not regulate the practice of ART, only the collection, processing, storage, and distribution of human gametes as the ‘articles of ART.’” CAHN, *NEW KINSHIP*, *supra* note 7, at 24.

<sup>41</sup> One exception here is the state of Washington, which adopted a modified open identity statute in 2011. See Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 293-94 (2013). Open identity is just the “default option,” however, and donors may choose to “opt out,” although their “medical records remain available.” *Id.*

person can donate gametes or on the number of families that can conceive from them. In sum, “self-policing,” rather than “top-down governance,” marks the fertility industry.<sup>42</sup>

Two of the issues mentioned above — the lack of mandatory caps on gamete donation and anonymous gamete donation — are particularly troubling for a growing number of commentators who believe that they could lead to “inadvertent consanguineous conception,” known more colloquially as “accidental incest.”<sup>43</sup> Most vocal among them is Professor Naomi Cahn, a legal expert on alternative reproduction who has written extensively and thoughtfully on the subject<sup>44</sup> and who has recently voiced serious concern about a few of its routine practices.

In Cahn’s view, donor anonymity and unrestricted gamete donation work together to lay the perfect conditions for accidental incest between consanguineous kin.<sup>45</sup> Children conceived from anonymous donors lack the sort of information that would allow them to identify who, exactly, their genetic progenitor is. Coupled with the fact that legal limits on the number of times that any one person can donate do not exist in the United States, anonymous donation renders unwitting incest between donor-conceived children — or, in a tragic re-enactment of *Oedipus Rex*,<sup>46</sup> between donor-conceived children and

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<sup>42</sup> CAHN, NEW KINSHIP, *supra* note 7, at 27. While the American Society for Reproductive Medicine (“ASRM”), the industry’s principal trade group, has promulgated certain recommendations — including the recommendation that clinics limit a single donor to no more than twenty five births based on an area population of 800,000 to avoid the risk of “inadvertent consanguineous conception” — clinics are in no way bound by those recommendations, as they are just non binding industry standards. See The Am. Soc’y for Reprod. Med., *Guidelines for Oocyte Donation*, 70 FERTILITY & STERILITY 5S, 6S (1998).

<sup>43</sup> Commentators have recently raised the possibility of accidental incest arising from anonymous embryo donation. See Sarah Elizabeth Richards, *Get Used to Embryo Adoption*, TIME (Aug. 24, 2013), <http://ideas.time.com/2013/08/24/get-used-to-embryo-adoption/?iid=tsmodule>. Incest concerns have also surfaced in the context of intrafamilial medically alternative reproduction (“IMAR”), which is the practice of using the gametes of family members to reproduce. See European Soc’y of Human Reprod. and Embryology, *Intrafamilial Medically Alternative Reproduction*, SCI. DAILY (Jan. 22, 2011), <http://www.sciencedaily.com/releases/2011/01/110120100942.htm>; see also Guido Pennings, *Incest, Gamete Donation by Siblings and the Importance of the Genetic Link*, 4 REPROD. BIOMED. ONLINE 13, 13 (2001).

<sup>44</sup> See *supra* notes 6–7 and accompanying text.

<sup>45</sup> See Cahn, *Accidental Incest*, *supra* note 4 *passim*.

<sup>46</sup> See SOPHOCLES: THE OEDIPUS CYCLE (Dudley Fitts & Robert Fitzgerald trans., 1949) (recounting the first play of Sophocles’ trilogy, *Oedipus Rex*, the tragic fall of the king of Thebes, who “accidentally” fell in love with his mother (Jocasta) after killing his father (Laius)). Like the Model Penal Code’s incest definition, criminal incest laws

their biological progenitors — a real possibility. In the most extreme version of this slippery slope scenario, one donor “populate[s] the world,”<sup>47</sup> making sexual relationships and marriage between genetically related persons all but certain.

Cahn is not alone in her concern about the risk of family romance that alternative reproduction creates. A few outspoken consumers and suppliers of gametes have publicly voiced similar concerns,<sup>48</sup> as have political actors,<sup>49</sup> prominent members of the Catholic Church,<sup>50</sup> and some national organizations. Most influential among the latter is the Institute for American Values (“Institute”), a public policy think tank “devoted to contributing intellectually to the renewal of marriage and family life and the sources of competence, character, and citizenship.”<sup>51</sup> Founded (and led) by David Blankenhorn, a former opponent of same-sex marriage<sup>52</sup> and the “star witness” for

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incorporate a scienter requirement, which is far from satisfied if half siblings engage in inadvertent romance. See MODEL PENAL CODE § 230.2 (Proposed Official Draft 1962) (providing that a person is guilty of incest “if he knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood [or an uncle, aunt, nephew or niece of the whole blood]”). Indeed, at least as far as the criminal law is concerned, “accidental incest” is not “incest” at all, if “incest” is defined as intentional sexual activity between people who are related within a certain statutorily prohibited degree. See *id.*

<sup>47</sup> Cahn, *The New Kinship*, *supra* note 8, at 412.

<sup>48</sup> See Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES (Sept. 5, 2011), <http://www.nytimes.com/2011/09/06/health/06donor.html>. Mroz discusses the creation of the Donor Sibling Registry (“Registry”) by Wendy Kramer and her son, Ryan Kramer; the Registry is available at DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com/> (last visited July 16, 2015). Individuals can search for “siblings” conceived from the same donor after signing up with the Registry and providing the donor number used at the sperm bank. *Id.* Ms. Kramer is the co author, with Naomi Cahn, of a recent guide for families with donor conceived children. See generally WENDY KRAMER & NAOMI CAHN, *FINDING OUR FAMILIES: A FIRST OF ITS KIND BOOK FOR DONOR CONCEIVED PEOPLE AND THEIR FAMILIES* (2013).

<sup>49</sup> For instance, perennial United States Senate candidate Alan Keyes attempted to stir incest fears when discussing alternative insemination by lesbians during a 2004 Illinois debate with then Senate candidate Barack Obama. See *Obama Debate Flashback: Obama Flubs Keyes Rebuttal (VIDEO)*, HUFFINGTON POST (Nov. 03, 2008, 5:44 PM EST), <http://www.huffingtonpost.com/2008/09/23/obama-debate-flashback-ob-n-128682.html>.

<sup>50</sup> See *Spanish Bishops Decries New Law on Assisted Reproduction*, CATH. NEWS AGENCY (Feb. 20, 2006, 12:00 AM), <http://www.catholicnewsagency.com/news/spanish-bishops-decries-new-law-on-assisted-reproduction/>.

<sup>51</sup> *Gay Marriage in Theology, Law and Politics*, BOS. COLL. BOISI CTR. FOR RELIGION & AM. PUB. LIFE, <http://www.bc.edu/centers/boisi/publicevents/s08/gaymarriage.html> (last visited Aug. 1, 2015); see also INST. FOR AM. VALUES, <http://www.americanvalues.org/> (last visited July 16, 2015).

<sup>52</sup> David Blankenhorn publicly repudiated his longtime opposition to same sex

Proposition 8's proponents in the federal trial over that amendment's constitutionality,<sup>53</sup> the Institute has discussed incest fears in a number of its publications dealing with alternative reproduction. These publications are critical of alternative reproduction in part because of the accidental incest threat that it purportedly raises.

Consider, for instance, the incest anxiety that appears in the Institute's 2010 report on anonymous sperm donation, *My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation* ("My Daddy's Name is Donor").<sup>54</sup> There, the Institute summarizes the findings of a study which it commissioned and whose objective it was "to learn about the identity, kinship, well-being, and social justice experiences of young adults who were conceived through sperm donation."<sup>55</sup> The study specifically asked each of its participants to what extent she agreed with the following statement: "When I'm romantically attracted to someone I have worried that we could be unknowingly related."<sup>56</sup> After comparing the responses of

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marriage two years ago in a *New York Times* Op Ed described as "shocking" and "astonishing." Blankenhorn, *supra* note 2. For commentary on Blankenhorn's announcement, see Richard Kim, *What's Still the Matter with David Blankenhorn*, NATION (June 24, 2012), <http://www.thenation.com/blog/168545/whats-still-matter-david-blankenhorn/>; Mark Oppenheimer, *In Shift, an Activist Enlists Same Sex Couples in a Pro Marriage Coalition*, N.Y. TIMES (Jan. 29, 2013), <http://www.nytimes.com/2013/01/30/us/in-shift-blankenhorn-forges-a-pro-marriage-coalition-for-all.html>. Since then, Blankenhorn has lost some conservative allies and financial contributors (Robert George, Maggie Gallagher) and gained some more left leaning ones (Jonathan Rauch, William Galston). See *id.* While Blankenhorn and the Institute might support gay marriage, however, they remain committed to defending the traditional family, which in their view consists of married, opposite sex parents and their biological children. See *infra* notes 183-87 and accompanying text. This is the same kind of family, it turns out, which Blankenhorn defended during his testimony in California's marriage equality case (known popularly as Proposition 8). See *infra* notes 183-85 and accompanying text.

<sup>53</sup> Frank Rich, *Two Weddings, a Divorce and 'Glee'*, N.Y. TIMES (June 12, 2010), <http://www.nytimes.com/2010/06/13/opinion/13rich.html>.

<sup>54</sup> See generally ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, INST. FOR AM. VALUES, *MY DADDY'S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION* (2010), available at [http://americanvalues.org/catalog/pdfs/Donor\\_FINAL.pdf](http://americanvalues.org/catalog/pdfs/Donor_FINAL.pdf).

<sup>55</sup> *Id.* at 5. For studies that have found that donor conceived children were not worse off (and, indeed, in some measures were better off) than children who were sexually conceived, see Nanette K. Gartrell et al., *Satisfaction with Known, Open Identity, or Unknown Sperm Donors: Reports from Lesbian Mothers of 17 Year Old Adolescents*, 103 FERTILITY & STERILITY 242, 247 (2015); Nanette Gartrell & Henny Bos, *US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17 Year Old Adolescents*, 126 PEDIATRICS 28, 33-34 (2010).

<sup>56</sup> MARQUARDT, GLENN & CLARK, *supra* note 54, at 109.

donor-conceived children with those of adopted children and those of children raised by two biological parents, the study concludes that “[d]onor offspring often worry about the implications of interacting with — and possibly forming intimate relationships with — unknown, blood-related family members.”<sup>57</sup> “A fear that most people raised by their biological parents have never even considered and basically cannot fathom,” the report continues, “is much on the minds of many donor offspring, far more so even compared to the adopted.”<sup>58</sup>

The report concludes its section dealing with donor-conceived individuals’ incest fears by suggesting that accidental incest among donor-conceived persons is a real possibility. It says:

Okay, fine, a reader might respond, but has it ever happened — that is, has anyone ever accidentally had sex with their brother or sister? Well, yes. Last year in Britain a story came to light of twins, male and female, separated at birth and adopted by different families. They met, fell in love, and married — and only then learned they were brother and sister.

Having the state say that you have no right to your medical history. Feeling attracted to people you are unknowingly related to. Realizing that you have accidentally committed incest with your half-brother or sister. Watching your own children entering the dating market and, with even more trepidation than the average parent feels, worrying that they might unknowingly date a cousin. These are the worries and fears of adult donor offspring today. And yes, *all of it* can happen.<sup>59</sup>

Incest anxiety reappears in the Institute’s most recent publication on alternative reproduction and intentional parenthood: *One Parent or Five: A Global Look at Today’s New Intentional Families* (“*One Parent or Five*”).<sup>60</sup> *One Parent or Five* presents itself as “the first systematic critique of the concept of intentional parenthood,”<sup>61</sup> a study which “offers a surprising and at times disturbing portrayal of practices now

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<sup>57</sup> *Id.* at 8.

<sup>58</sup> *Id.* at 35.

<sup>59</sup> *Id.*

<sup>60</sup> See generally ELIZABETH MARQUARDT, COMM’N ON PARENTHOOD’S FUTURE, *ONE PARENT OR FIVE: A GLOBAL LOOK AT TODAY’S NEW INTENTIONAL FAMILIES* (2011), available at [http://americanvalues.org/catalog/pdfs/one parent or five.pdf](http://americanvalues.org/catalog/pdfs/one%20parent%20or%20five.pdf) [hereinafter *ONE PARENT OR FIVE*].

<sup>61</sup> *Id.* at 6.



being followed around the world.”<sup>62</sup> These practices include anonymous sperm donation, single mothers and fathers by choice, posthumous conception, and poly-parenting, that is, three, four, and five-parent families.<sup>63</sup> Appraising anonymous sperm donation specifically, *One Parent or Five* notes that donor-conceived children fear “being attracted to or having sexual relations with someone to whom they are unknowingly related.”<sup>64</sup>

Last, incest anxiety appears in some of the publications of Alana Newman, an outspoken opponent of all alternative reproduction with third-party gametes.<sup>65</sup> Newman is a writer and researcher at the Institute for American Values and at the Witherspoon Institute, the conservative think tank that opposes same-sex marriage, alternative reproduction, and non-biological parenthood.<sup>66</sup> She is also the founder of *The Anonymous Us Project*, “a story-collective for any and all participants in 3PR [third-party reproduction].”<sup>67</sup> In one *Anonymous Us* story, the writer — a person conceived by anonymous donor gametes — asks: “Will I be attracted to a familiar stranger in my

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<sup>62</sup> *Id.*

<sup>63</sup> *See id.*

<sup>64</sup> *Id.* at 55.

<sup>65</sup> For a biographical overview of Newman, see ALANANEWMAN.COM, <http://alananewman.com/> (last visited July 16, 2015); Alana S. Newman, *What Are the Rights of Donor Conceived People?*, WITHERSPOON INST. (Aug. 2, 2013), <http://www.thepublicdiscourse.com/2013/08/10511/> [hereinafter *What Are the Rights?*]. Newman has argued that reproduction with third party gametes ought to be a crime. *See id.*

<sup>66</sup> For the Witherspoon Institute’s mission statement, see *The Mission of the Witherspoon Institute*, WITHERSPOON INST., <http://winst.org/about/mission/> (last visited July 17, 2015). The Witherspoon Institute reportedly funded the “Regnerus study,” which compared children raised by gay parents to those raised by heterosexual parents. The Regnerus study has come under serious attack by academics, policymakers, and courts because of the cohort that Professor Regnerus used to study the effects of gay parenting. For the study, see generally Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752 (2012). A Michigan district court has criticized and rejected the study as “entirely unbelievable and not worthy of serious consideration,” while others have summarized the Regnerus study’s myriad critics. *See DeBoer v. Snyder*, 973 F. Supp. 2d 757, 766 (E.D. Mich. 2014), *rev’d* 772 F.3d 388 (6th Cir. 2014); Nathaniel Frank, *The Shamelessness of Professor Mark Regnerus*, SLATE (Mar. 4, 2014, 5:30 PM), [http://www.slate.com/blogs/outward/2014/03/04/mark\\_regnerus\\_testifies\\_in\\_michigan\\_same\\_sex\\_marriage\\_case\\_his\\_study\\_is.html](http://www.slate.com/blogs/outward/2014/03/04/mark_regnerus_testifies_in_michigan_same_sex_marriage_case_his_study_is.html). For reports linking the study with the Witherspoon Institute, see Sofia Resnick, *Controversial Gay Marriage Study Author May Be Political Operative*, SALON (Apr. 11, 2013, 1:56 PM PDT), [http://www.salon.com/2013/04/11/controversial\\_gay\\_marriage\\_study\\_author\\_may\\_be\\_political\\_operative\\_partner/](http://www.salon.com/2013/04/11/controversial_gay_marriage_study_author_may_be_political_operative_partner/).

<sup>67</sup> *See Anonymous Us*, ALANANEWMAN.COM, <http://alananewman.com/the-anonymous-us-project/> (last visited July 17, 2015).

classes? Will I fall in love with him and kiss him passionately in an act of accidental incest?”<sup>68</sup> Similarly, in a blog post, Newman lists the “threat of accidental incest” as one of the many dangers of sperm donation, along with the “loss of identity, medical alienation, kin alienation . . . disenfranchised grief, and confusion over the sacred vs. commercial”<sup>69</sup> that she believes donor-conceived children suffer.

It is worth noting that the argument from incest is not completely new, as some writers raised the possibility of inadvertent consanguinity during the early (or earlier) years of alternative insemination.<sup>70</sup> In the past, though, commentators mentioned accidental incest only fleetingly when discussing the ramifications of certain methods of alternative reproduction. Today, as the next Section shows, commentators are citing accidental incest as not just a reason, but one of the best reasons to regulate alternative reproduction.<sup>71</sup>

### B. The Incest Prevention Justification’s Potential Effects

Alternative reproduction’s incest prevention justification is a slippery slope argument, one that posits that something at the top of the slope (alternative reproduction) ought to be regulated, restricted, or eliminated in order to avert something even worse at the bottom

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<sup>68</sup> *Uncertainty Is Killing Me*, ANONYMOUSUS.ORG (Feb. 6, 2012), <http://anonymousus.org/uncertainty-is-killing-me/>.

<sup>69</sup> *Introduction to Harms of Donor Conception*, ALANANEWMAN.COM (Oct. 17, 2013), <http://alananewman.com/introduction-to-harms-of-donor-conception/>.

<sup>70</sup> For instance, in a 1948 *Virginia Law Review* note, one student writer queried whether doctors could “prevent [the] possible consanguinity resulting from [the] practice” of artificial insemination. Note, *Artificial Insemination Versus Adoption*, 34 VA. L. REV. 822, 824 (1948). And in 1956, the author of a *New York University Law Review* article averred that “[t]here can be little doubt that the increasing production of children by means of artificial insemination from unknown donors enhances the possibilities of incestuous marriages and incestuous relationships.” Morris Ploscowe, *The Place of Law in Medico Moral Problems: A Legal View II*, 31 N.Y.U. L. REV. 1238, 1243 (1956); see also George P. Smith, II, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127, 133 (1968). Around this same time on the other side of the Atlantic, one scholar from the London School of Economics went so far as to develop a mathematical formula for estimating the frequency of “incestuous marriages” that could result from artificial insemination. John Hajnal, *Artificial Insemination and the Frequency of Incestuous Marriages*, 123 J. ROYAL STAT. SOC’Y 182, 182–85 (1960). For other publications that explore the connection between alternative reproduction and incest around this time period, see N.L. Ross, *Artificial Insemination, Incest, and New Genetic Nightmares*, WASH. POST, Nov. 10, 1974, at L4.

<sup>71</sup> See *infra* notes 80–85 and accompanying text.

(accidental incest).<sup>72</sup> For instance, it is the Institute for American Values's hope that the possibility of accidental incest, along with other perceived hazards of alternative reproduction, will convince lawmakers to ban all alternative reproduction that permits individuals to have children who will not know either, or both, of their biological progenitors — as, for example, when a single woman or a lesbian same-sex couple uses anonymous donor sperm to conceive a child. The Institute's first report on alternative reproduction, *The Revolution in Parenthood: The Emerging Global Clash Between Adult Rights and Children's Needs* ("The Revolution in Parenthood"),<sup>73</sup> recommends a "moratorium or a 'time out' [of] five years" on all alternative reproduction in order for policymakers and lawmakers to reflect and deliberate on its potential consequences.<sup>74</sup>

The Institute's second report, *My Daddy's Name is Donor*, goes further. There, the Institute uses the incest threat to urge "leaders in the law" to reconsider non-biological and "intentional" parenthood (other than adoption).<sup>75</sup> It says: "Contrary to the arguments put forth by legal scholars who advocate for a guiding principle based on 'intentional parenthood,' there is not much empirical basis to suggest that 'intentional parenthood' is good for children, and there are substantial reasons to question that principle."<sup>76</sup> If "intentional parenthood" and the procedures that facilitate it (including gamete donation) are not abolished, then it is the Institute's position that lawmakers ought to pass regulations that require "screening of prospective parents" prior to reproducing with third-party assistance.<sup>77</sup>

In addition, the Institute urges "would-be parents" to consider not reproducing at all if such reproduction involves gamete donation. It says:

We fully sympathize with the pain of infertility and the desire to have a child. We also ask that if you are considering having a child with donated sperm or eggs, you avail yourself of all

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<sup>72</sup> See Cahill, *Same Sex Marriage, Slippery Slope Rhetoric*, *supra* note 3, at 1550 54 (discussing the mechanics of the slippery slope).

<sup>73</sup> ELIZABETH MARQUARDT, *THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS* (2006), available at <http://americanvalues.org/catalog/pdfs/parenthood.pdf>. *The Revolution in Parenthood* considers the possibility of accidental incest between donor conceived children, but only briefly. See *id.* at 33, 38 n.49.

<sup>74</sup> See *id.*

<sup>75</sup> MARQUARDT, GLENN & CLARK, *supra* note 54, at 77.

<sup>76</sup> *Id.*

<sup>77</sup> See *id.* at 78.

the available information about the impact on children, young people, and their families of being conceived this way. Please consider adoption, or acceptance, or being a loving stepparent, foster parent, aunt or uncle, or community leader who works with children. There are many ways to be actively involved with raising the next generation without resorting to conceiving a child who is purposefully destined never to share a life with at least one of his or her biological parents.<sup>78</sup>

Where *The Revolution in Parenthood* recommends a temporary cessation of alternative reproduction, then, *My Daddy's Name is Donor* endorses its elimination for those who use it to parent non-biological children. In this sense, *The Revolution in Parenthood* and *My Daddy's Name is Donor* cohere with other statements that Blankenhorn has made with respect to sperm donation — and why the state ought to ban its use by anyone who cannot replicate the married, dual-gendered, biological family.<sup>79</sup>

Like the Institute, Professor Naomi Cahn has also invoked accidental incest as a catalyst for regulating alternative reproduction.

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<sup>78</sup> *Id.* at 79.

<sup>79</sup> For instance, Blankenhorn concludes his *New York Times* Op Ed announcing his newfound support for same sex marriage by pressing individuals to reconsider whether they ought to be “denying” children biological parenthood by relying on certain assisted reproductive means to have them. See Blankenhorn, *supra* note 2. Similarly, in pro father manifesto *Fatherless America: Confronting Our Most Urgent Social Problem*, Blankenhorn analogizes sperm donation to other “fatherless” situations, like “deadbeat dads.” DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* 172 (1995). He says: “[S]tate legislatures across the nation should support fatherhood by regulating sperm banks. New laws should prohibit sperm banks and others from selling sperm to unmarried women and limit the use of artificial insemination to cases of married couples experiencing fertility problems. In a good society, people do not traffic commercially in the production of radically fatherless children.” *Id.* at 223. Blankenhorn makes this recommendation after cataloguing the deleterious effects that sperm donation will have on society, including “the decline of child well being and the rise of male violence, particularly predatory sexual violence.” *Id.* at 184. “A society of Sperm Fathers,” he warns, “is a society of fourteen year old girls with babies and fourteen year old boys with guns.” *Id.* “Sperm Fatherhood,” he remarks, is a “means of paternal suicide: the collaboration of the male in the eradication of his fatherhood.” *Id.* Indeed, Blankenhorn goes so far as to compare sperm donation to the Nazis’ plan of exterminating Europe’s Jewish population — a plan referred euphemistically as “the final solution.” See *id.* He says: “Toward the end of the fatherless society, the Sperm Father represents the final solution.” *Id.* Alana Newman, Blankenhorn’s colleague at the Institute, argues that reproduction with third party gametes ought to be made criminal, likening it to slavery and sexual predation. See Newman, *What Are the Rights?*, *supra* note 65.

Importantly, Cahn's arguments in favor of greater regulation of alternative reproduction are not as extreme as those espoused by several writers at the Institute. For instance, unlike the Institute, Cahn supports intentional parenthood, non-biological parenthood, alternative family formation, and gay parenthood.<sup>80</sup> Nevertheless, Cahn proposes legal interventions that could have debilitating effects on the procreative choice and opportunity of alternative reproduction's many users, from heterosexual couples and single women to sexual minorities.

It is Professor Cahn's hope that incest will be *the* issue that helps to catalyze (what she sees as) much-needed legal reform in this area. "[I]ncest," she contends, "serves as a dramatic illustration of the special nature of donor kinship."<sup>81</sup> She says:

[t]he potential for incest could be a way to create, change, or impose laws that regulate the fertility industry. Sweeping legal change often begins with something specific, and incest provides an excellent example or case study to use in pushing for wider regulation of the industry.<sup>82</sup>

Some of that regulation includes mandatory limits "on the number of children born from any individual donor."<sup>83</sup> Some includes laws requiring "special birth certificates for the donor conceived" indicating that they were conceived through donor gametes.<sup>84</sup> And some of it includes mandatory disclosure and the elimination of gamete donor anonymity. As Cahn puts it, incest is "*one of the key, driving issues for disclosure*."<sup>85</sup>

On this second point, Cahn is hopeful that incest's "dangers" will motivate the federal government to abolish donor anonymity completely.<sup>86</sup> Moreover, she is optimistic that a mandatory disclosure

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<sup>80</sup> See CAHN, *NEW KINSHIP*, *supra* note 7, at 163-67.

<sup>81</sup> *Id.* at 121.

<sup>82</sup> *Id.* (emphasis added).

<sup>83</sup> *Id.*

<sup>84</sup> See *id.* at 129. Cahn concedes that such birth certificates "which create a separate, and possibly stigmatized, class of individuals and which infringe on those individuals' privacy" "may not be the optimal method." *Id.*

<sup>85</sup> *Id.* at 117 (emphasis added).

<sup>86</sup> See Cahn, *Necessary Subjects*, *supra* note 8, at 219-21. Anonymous donation would be eliminated by the establishment of a national mandatory donor registry, which would require "that fertility clinics, sperm and egg banks, and physicians' offices maintain records for each child born through donor gametes and guarantee[] that gamete offspring have the right to access those records." *Id.* Providers, banks, and doctors that fail to comply with the registry's requirements would be subject to

regime will not lead to a substantial decrease in the number of available donors, pointing to other countries, like England and Sweden, where similar laws have gone into effect.<sup>87</sup> In those countries, she observes, mandatory disclosure led to an increase in older donors (not to the eradication of all donors), as older donors were less concerned about anonymity.<sup>88</sup>

Cahn's proposals — and incest's role in helping to shape them — warrant skepticism for a few reasons. First, despite Cahn's assurances otherwise, there is strong reason to think that mandatory disclosure reduces the number of sperm donors;<sup>89</sup> certainly, that is a possibility that would need to be offset by a clear benefit.<sup>90</sup> According to several commentators, mandatory disclosure regimes have led to donor shortages in those countries that have instituted them, and in some cases to severe shortages.<sup>91</sup> For instance, a *Time* magazine article from

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sanctions. *See id.* at 218. Moreover, donor conceived children could access the registry to get identifying information about their donor upon reaching the age of majority. *See id.* at 205. While Cahn's proposed registry "prohibits" anonymous donation in the sense that it requires fertility providers, banks, and doctors to obtain (and disclose) identifying donor information, it does not require parents of donor conceived children to inform their children that a federal registry with such information exists — indeed, it does not require those parents to reveal to their children that they were donor conceived at all. It is for this reason that Glenn Cohen characterizes Cahn's proposal as a "passive" rather than an "active" registry, one which requires a child to reach out to it rather than one which "would itself contact the child at age eighteen to let him or her know that he or she was donor conceived and allow (but not force) him or her to receive information about the donor." I. Glenn Cohen, *Response: Rethinking Sperm Donor Anonymity: Of Changed Selves, Non Identity, and One Night Stands*, 100 GEO. L.J. 432, 446 (2012) [hereinafter *Rethinking Anonymity*].

<sup>87</sup> *See* CAHN, *NEW KINSHIP*, *supra* note 7, at 162 (observing that "[i]n other countries, the fears of accidental incest have resulted in precautionary legislation that places limits on the number of offspring any given donor can produce" and discussing such legislation in the Netherlands, Austria, and England).

<sup>88</sup> *See* Cahn, *The New Kinship*, *supra* note 8, at 421.

<sup>89</sup> *See* Cohen, *Rethinking Anonymity*, *supra* note 86, at 444 (arguing that mandatory sperm donor registries could have a "chilling effect on the willingness to engage in donations").

<sup>90</sup> According to Cahn, that clear benefit is satisfying the "relational concerns of family law." *See* CAHN, *NEW KINSHIP*, *supra* note 7, at 175–76 (stating that "[e]nsuring an adequate supply of donors is critical to a medical model of donor families, but that does not need to be sacrificed to the relational concerns of family law. . . . While it is important not to limit access to reproductive technology on the basis of the parents, it is critical to think about the impact of using particular technologies on all involved"). This Article critiques that benefit on normative grounds below. *See infra* Part V.A and accompanying text.

<sup>91</sup> *See* Gaia Bernstein, *Regulating Reproductive Technologies: Timing, Uncertainty and Donor Anonymity*, 90 B.U. L. REV. 1189, 1205–18 (2010) (revealing the negative impact of prohibitions on gamete donor anonymity on gamete supplies in Victoria,

June 2014 reports that England is experiencing a “serious sperm shortage” because of its decision to ban sperm donor anonymity in 2005.<sup>92</sup> Doctors there worry that the shortage will precipitate sub-optimal practices, including “risky insemination practices like do-it-yourself insemination with a friend’s sperm” and the use of lower quality sperm by clinics “in order to get donors through the door.”<sup>93</sup> Should mandatory disclosure become the law of the land in the United States, then, users of alternative reproduction — including single persons, sexual minorities, heterosexual couples, and asexuals<sup>94</sup> — may find it difficult, if not impossible, to become parents.

Second, a shift in the demographics of sperm donors is not necessarily neutral and cannot be ignored. Recent studies suggest that the gametes of older and younger donors are not alike in all ways. For instance, in the most comprehensive study to date of paternal age and offspring mental health (published in the journal *JAMA Psychiatry* and

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Sweden, and the United Kingdom); June Carbone & Paige Gottheim, *Creating Life? Examining the Legal, Ethical and Medical Issues of Assisted Reproductive Technologies: Markets Subsidies Regulation and Trust: Building Ethical Understanding*, 9 J. GENDER RACE & JUST. 509, 540 41 (2006) (discussing the drop in gamete supplies at one fertility clinic after Australia eliminated gamete donor anonymity); Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 46 (2008) (stating that “[e]xperience in other countries confirms that mandating donor identity significantly reduces the number of donors willing to provide gametes” and concluding that “a non anonymous donor policy in the U.S. would reduce the availability of donor sperm for unmarried women, the vast majority of whom rely on commercial sperm banks to fulfill their procreative dreams”); Kristy Horsey, *Sperm Donor “Crisis” in UK*, BIONEWS (Sept. 18, 2006), [http://www.bionews.org.uk/page\\_12851.asp](http://www.bionews.org.uk/page_12851.asp) (describing the rapid decrease in donor supplies in the United Kingdom following its adoption of a mandatory disclosure regime). A mandatory disclosure regime could have additional negative effects, including the sacrifice of reproductive users’ autonomy and the increased cost of donated gametes. See I. Glenn Cohen & Travis G. Coan, *Can You Buy Sperm Donor Identification? An Experiment*, 10 J. EMP. L. STUDS., 715, 742 43 (2013) (finding that the price of donated sperm would increase under a mandatory disclosure regime); Ilke Turkmendag, Robert Dingwall & Therese Murphy, *The Removal of Donor Anonymity in the UK: The Silencing of Claims by Would Be Parents*, 22 INT’L J.L. POL’Y & FAM. 283, 301 02 (2008) (discussing autonomy concerns).

<sup>92</sup> Sam Frizell, *UK Facing ‘Major’ Sperm Shortage*, TIME (June 28, 2014), [http://time.com/2936014/uk\\_sperm\\_shortage/](http://time.com/2936014/uk_sperm_shortage/).

<sup>93</sup> *Id.*

<sup>94</sup> Asexuals — those who experience little to no sexual desire — might be characterized as “socially infertile” in the same way that gays and lesbians are sometimes said to be, as both groups inhabit contexts that render pregnancy impossible without third party assistance, even as they might otherwise be “medically” fertile. For a discussion of the way in which the law burdens asexuals across multiple legal domains (but not in the third party reproduction context), see generally Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 345 86 (2014).

recently reported in *The New York Times*), researchers found that “children born to middle-aged men are more likely than those born to younger fathers to develop any of a range of mental difficulties, including attention deficits, bipolar disorder, autism and schizophrenia.”<sup>95</sup> The mere possibility that these conditions are associated with advanced paternal age might give some alternative reproduction users pause when choosing older donors.<sup>96</sup>

<sup>95</sup> K.J. Dell’Antonia, *Older Fathers: Assessing the Risks*, N.Y. TIMES: MOTHERLODE (Feb. 26, 2014), <http://parenting.blogs.nytimes.com/2014/02/26/older-fathers-assessing-the-risks/>; see also Benedict Carey, *Mental Illness Rates Higher for Children of Older Fathers, Study Finds*, N.Y. TIMES (Feb. 26, 2014), <http://www.nytimes.com/2014/02/27/health/mental-illness-risk-higher-for-children-of-older-parents-study-finds.html> (discussing that children born to older fathers are more likely to develop mental illnesses). For the JAMA study, see Brian M. D’Onofrio et al., *Paternal Age at Childbearing and Offspring Psychiatric and Academic Morbidity*, 71 JAMA PSYCHIATRY 432, 437–38 (2014). For the link between advanced paternal age and autism, see K.J. Dell’Antonia, *The Clock Ticks for Men as Well*, N.Y. TIMES (Aug. 24, 2012), <http://www.nytimes.com/2012/08/26/fashion/autism-study-starts-clock-for-prospective-fathers.html>.

<sup>96</sup> In this sense, laws abolishing sperm donor anonymity could alter not only the persons “with whom” assisted reproductive users reproduce (e.g., older rather than younger donors) but also “whether” assisted reproductive users reproduce at all (if, say, users of third party reproduction no longer wanted the gametes of older donors and the gametes of older donors were the only ones available). As such, these legal interventions could create what Glenn Cohen has identified as a morally (and legally) questionable “Non Identity Problem.” He says: “Unless the State’s failure to intervene would foist upon the child a ‘life not worth living,’ any attempt to alter whether, when, or with whom an individual reproduces cannot be justified on the basis that harm will come to the resulting child, since but for that intervention the child would not exist.” I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 426 (2011). The Non Identity Problem posits that “we cannot be said to harm children by creating them as long as we do not give them a life not worth living.” *Id.* at 437. Laws that restrict whether, when, and with whom individuals reproduce because of a concern for their resulting children’s best interests pose a Non Identity Problem, in Cohen’s view, because those laws in effect posit that it is better for a child never to have come into existence than to be born into circumstances adverse to their best interests—circumstances that include the mere possibility of committing accidental incest with a donor conceived “sibling.” Cohen’s argument is based on the “Non Identity Problem” of philosopher Derek Parfit. See *id.* John Robertson applied Parfit’s theory to proposed regulations of alternative reproduction in an earlier article. See John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 8 (2004) (arguing that “welfare of the child” rationales in favor of greater regulation of alternative reproduction “present an ethical paradox,” namely, that “the only way to prevent [the negative welfare] effects [of alternative reproduction] would be to eschew use of the ART that makes the birth of the child possible. This is the famous philosophical problem that Derek Parfit and others call ‘the non identity problem’—the person protected never benefits because they are never born”). For Parfit’s articulation of the Non Identity Problem, see DEREK PARFIT, *REASONS AND PERSONS* 351–79 (1984).



## II. LOOKING BEYOND BIOLOGY AND GENETICS

Professor Cahn might be right to characterize incest as “dramatic” when she argues that incest is a “dramatic illustration” of why the law ought to change;<sup>97</sup> incest, after all, is associated first and foremost in our cultural imagination with a drama.<sup>98</sup> However, it is a “dramatic illustration” that ought to give us pause for several reasons. First, the incest prevention justification could rest on disgust,<sup>99</sup> which is a morally questionable — and unconstitutional — basis for lawmaking.<sup>100</sup> Second, the incest prevention justification assumes that

<sup>97</sup> See CAHN, *NEW KINSHIP*, *supra* note 7, at 117, 121.

<sup>98</sup> SOPHOCLES, *supra* note 46.

<sup>99</sup> The genetic harm rationale for regulating alternative reproduction in incest minimizing ways (and for banning incestuous relationships more generally) rests on the notion that genetic abnormality, and its physical and mental effects, is singularly disconcerting, different enough from other kinds of disabilities — like poverty, which is highly resistant to change — that people might be born “into.” See PEW CHARITABLE TRUSTS, *PURSUING THE AMERICAN DREAM: ECONOMIC MOBILITY ACROSS GENERATIONS 2* (2012), available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pct\\_assets/2012/PursuingAmericanDream.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pct_assets/2012/PursuingAmericanDream.pdf); *Born Poor? Half of These Babies Will Spend Most of Their Childhoods in Poverty; Significantly More Likely to Be Poor 30 Years Later*, URBAN INST. (June 30, 2010), <http://www.urban.org/publications/901356.html>; see also Miles Rapoport & Jennifer Wheary, *Running in Place: Where the Middle Class and the Poor Meet*, DEMOS (Oct. 14, 2013), <http://www.demos.org/publication/running-place-where-middle-class-and-the-poor-meet> (summarizing data showing that Americans born into the lowest income quintile will remain in the bottom 20 percent of all earners for the rest of their lives and that 70 percent of those from the lowest income quintile will never make it past the bottom 40 percent of earners). The uniquely troubling possibility of genetic abnormality might be explained by society’s view of physical disability and mental retardation, each of which have historically been, and continue to be, elicitors of discomfort and disgust. See, e.g., *Tennessee v. Lane*, 541 U.S. 509 (2004) (cataloguing the panoply of laws that targeted people with disabilities); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 462 (1985) (Marshall, J., concurring) (observing that the mentally disabled were once subjected to a “regime of state mandated segregation and degradation . . . that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow”); Martha Nussbaum, *No Offense: Mere Disgust Should Not Constitute a Cause of Action*, AM. LAW. (Oct. 1, 2004), <http://www.law.uchicago.edu/news/nussbaum100104> (arguing that “[t]he mentally retarded are typically viewed with both fear and disgust”).

<sup>100</sup> Several scholars have made a strong case for why we ought to jettison disgust from lawmaking. See generally MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* (2010) [hereinafter *FROM DISGUST TO HUMANITY*]; MARTHA NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 20–21 (2004) [hereinafter *HIDING FROM HUMANITY*] (same); Martha Nussbaum, “*Secret Sewers of Vice*”: *Disgust, Bodies, and the Law*, in *THE PASSIONS OF LAW* 45, 19–55 (Susan A. Bandes ed., 1999); Cahill, *Same Sex Marriage, Slippery Slope Rhetoric*, *supra* note 3 *passim*; Mona Lynch, *Pedophiles and Cyber Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex*

prohibiting consensual incest (of the sort captured by the accidental incest rationale<sup>101</sup>) is a valid governmental objective. More specifically, if there were no constitutionally sufficient basis for state bans on consensual incest between certain family members, as some commentators have argued,<sup>102</sup> then the accidental incest argument loses force.

This Article, though, focuses on a different reason to reject the argument from incest: because that argument, like the taboo from which it derives, is about familial establishment — and not, or at least not only, about averting biological/genetic harm. Put differently, the argument from incest is less about genetic abnormality, as it professes to be, and more about familial abnormality. Less about incest per se, and more about familial norms. Less about kinship prohibition, and more about kinship production.

The shift that this Article proposes — from thinking about the incest prevention justification in terms of genetics and biology to thinking about it in terms of family norms — makes more sense if one stops to consider the weaknesses of that justification. As mentioned, the incest prevention justification is at its heart a genetic or biological argument. Of the four most common reasons cited in defense of incest prohibitions — minimizing genetic harm, punishing presumptively non-consensual sex within a relationship of dependency, discouraging intra-familial strife, and legislating morality and disgust<sup>103</sup> — two of them are

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*Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 557–62 (2002); Sonia M. Suter, *The “Repugnance” Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1588 (2008). A series of recent Supreme Court decisions appears to agree, suggesting that laws infected with disgust are unconstitutional — even if those laws also rest on constitutionally palatable justifications. See *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (holding that morality does not constitute a legitimate state interest under the Due Process Clause); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that animus or hostility against individuals on account of their membership in a class — there, sexual minorities — does not constitute even a legitimate state interest under the Equal Protection Clause).

<sup>101</sup> Some clarification here is helpful. The relationships between donor conceived individuals envisioned by supporters of the accidental incest rationale are consensual in the sense that the sex/intimacy that might occur within those relationships is not (necessarily) the product of coercion. To be sure, two donor conceived individuals might lack knowledge of their relatedness, but such ignorance does not vitiate their consent to the “incestuous” intimacy that might occur between them.

<sup>102</sup> See, e.g., DANIEL MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, *PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES* 119 (2009) (arguing that not all incest ought to be subject to a criminal or civil ban).

<sup>103</sup> For a discussion of these rationales, see CAHN, *NEW KINSHIP*, *supra* note 7, at 119–121; Markus D. Dubber, *Policing Morality: Constitutional Law and the*

inapplicable to donor-conceived families. If a donor-conceived brother and sister from different families meet in college, fall in love, and “commit” accidental incest, then there is no concern about non-consensual sex within a relationship of dependency or about intra-familial strife because our hypothetical brother and sister were not raised in the same household. A third possible reason to prohibit incest and to regulate assisted reproduction in incest-preventative ways — the legislating morality and disgust rationale — is likely unconstitutional.<sup>104</sup> What we are left with, then, is the minimizing genetic/biological harm rationale as the only immediately plausible basis to regulate assisted reproduction for incest-related reasons.

If that is right, then the incest prevention justification suffers from enough weaknesses to prompt an examination of the work that justification is doing in contemporary discussions about alternative reproduction. The first weakness is an empirical one: proponents of that rationale have not shown that the risk of accidental incest between donor-conceived individuals is great enough to justify their suggested regulatory reforms as well as the burdens those reforms will place on users of alternative reproduction.<sup>105</sup> The second weakness is a structural one: the incest prevention justification is plagued with under-inclusion, both with respect to its ultimate object of concern (genetic abnormality) and with respect to its immediate object of concern (accidental incest). At the very least, under-inclusion of this sort is an invitation to consider what it is about incest that has captured the attention of policymakers and scholars — indeed, what it is about incest that explains its atavistic emergence in legal and political debates over intimate and family life.

First, the incest prevention justification is under-inclusive with respect to its ultimate purported concern: genetic abnormality and its

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*Criminalization of Incest*, 61 U. TORONTO L.J. 737, 742 (2011).

<sup>104</sup> See *supra* notes 99–100 and accompanying text.

<sup>105</sup> Other than statements like accidental incest between donor conceived individuals “can happen” and is “on the minds of many donor conceived children,” empirical data on the question of how likely it is to happen are lacking in commentators’ proposals to curtail alternative reproduction for incest preventative reasons. “[W]ith more than 40,000 children born from donor eggs and sperm last year,” Cahn notes, “concerns about what is now called ‘inadvertent consanguinity’ are quite real.” CAHN, *NEW KINSHIP*, *supra* note 7, at 61. What Cahn does not tell us, though, is how real the threat of accidental incest actually is. Cahn cites to one source but that source is just a meta analysis of existing mathematical models that makes the case for why more sophisticated mathematical modeling is necessary. See Neroli Sawyer & John McDonald, *A Review of Mathematical Models Used to Determine Sperm Donor Limits for Infertility Treatment*, 90 FERTILITY & STERILITY 265, 265–66 (2008).

physical and mental effects. If genetic abnormalities were so worrisome, then one would expect commentators to focus on other situations where reproduction increases the risk of their occurrence, as when men and women above a certain age reproduce<sup>106</sup> or when individuals with certain genetically-related disorders reproduce.<sup>107</sup> No commentator, however, has recently suggested that the law should curtail those actors' procreative freedom in order to prevent congenital defects in resulting progeny.<sup>108</sup> In fact, one of the proposals to alleviate the gamete shortage that could result from moving to an open donor regime — the use of older donors, who are reputedly less concerned with preserving anonymity than their younger counterparts<sup>109</sup> — could itself increase the risk of genetic harm, considering the possible link between advanced paternal age and certain genetically-related disorders.<sup>110</sup> In other words, genetic harm could flow from the very solution offered to minimize its risk.

In addition, if the consequences of congenital defects — life dependency on third-parties, including the state; physical and psychological pain — were so worrisome, then one would expect commentators to focus on other situations where reproduction increases their risk. Poverty is an “inherited” condition that has a

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<sup>106</sup> For instance, older men and women who reproduce have a higher risk of having children with certain genetic conditions, including Down Syndrome and autism; for a woman having a child at age 45, “the probability of Down syndrome alone roughly matches the 4 percent cumulative risk of birth defects from cousin marriage,” which are prohibited in 25 states. William Saletan, *Incest and Delayed Motherhood*, SLATE (May 19, 2008), [http://www.slate.com/blogs/humannature/2008/05/19/incest\\_and\\_delayed\\_motherhood.html](http://www.slate.com/blogs/humannature/2008/05/19/incest_and_delayed_motherhood.html); see also Michele Goodwin, *A View From the Cradle: Tort Law and the Private Regulation of Alternative Reproduction*, 59 EMORY L.J. 1041, 1046 (2010) (observing that “[i]n more than 40% of pregnancies involving women over thirty, chromosomal abnormalities are present in the fetus, and abnormalities rise to about 70% in women forty and over”).

<sup>107</sup> For instance, non related people who are both carriers of a recessive gene that causes certain autosomal recessive disorders, like Cystic Fibrosis or Tay Sachs disease, are at an increased risk of having a child with that disorder. See *Tay Sachs Disease Information Page*, NAT'L INST. NEUROLOGICAL DISORDERS & STROKE (Oct. 6, 2011), <https://www.ninds.nih.gov/disorders/taysachs/taysachs.htm>.

<sup>108</sup> This Article says “recently” because sterilization of the mentally disabled was a practice not only upheld as constitutional in the 1927 Supreme Court case *Buck v. Bell* but passionately endorsed by its author, Justice Holmes, who there said: “It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough.” *Buck v. Bell*, 274 U.S. 200, 207 (1927). *Buck v. Bell* has never been overruled.

<sup>109</sup> See *supra* note 88 and accompanying text.

<sup>110</sup> See *supra* notes 95–96 and accompanying text.

range of adverse health consequences for those born into it.<sup>111</sup> And yet, no commentator has recently suggested that we directly curtail the reproductive opportunities of the economically disadvantaged in order to avoid them.<sup>112</sup>

Second, the incest prevention justification is under-inclusive with respect to its immediate purported target: accidental incest between consanguineous kin. If accidental incest were so concerning, then one wonders why commentators have not acknowledged other situations where a law — or its absence — sets the conditions for accidental incest to occur. For instance, the paternal presumption<sup>113</sup> creates the conditions for accidental incest to occur between biological kin at least as much as a practice that does not require gamete providers to disclose their identity to any progeny that result from their donation. In fact, the paternal presumption arguably creates an even greater risk of accidental incest than does anonymous sperm donation given that the paternal presumption applies — or, at least, has traditionally applied<sup>114</sup> — in a context that would not necessarily induce a child to question her biological origins: heterosexual married parenthood. By contrast, more and more children conceived from anonymous sperm today are born into a context that at the very least puts them on presumptive notice about the existence of other biological progenitors: single women and lesbian same-sex partners.<sup>115</sup> Whereas incest has

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<sup>111</sup> See *supra* note 99.

<sup>112</sup> Some legislators have supported indirect restrictions on the reproductive capacity of women on public assistance by offering those women financial incentives to use contraception like Norplant. Within two years of Norplant's approval by the Food and Drug Administration, legislators in thirteen states had proposed nearly two dozen bills offering incentives for, or requiring use of, Norplant by women on public assistance; none of those proposals passed. See generally DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* ch. 3 (1997).

<sup>113</sup> The common law paternal presumption treats the husband of the woman who gave birth to a child as the presumed father of that child. While in most states the paternal presumption may be rebutted with DNA evidence, in some states it continues to operate as an irrebuttable presumption. See, e.g., June Carbone & Naomi Cahn, *Current Issue in Child Support and Spousal Support, Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 224–28 (2011) [hereinafter *Current Issue*] (discussing the states that maintain an irrebuttable presumption).

<sup>114</sup> See Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same Sex Couples Era*, 86 B.U. L. REV. 227, 240–42 (2006) (discussing the application of the 'paternal presumption' of legitimacy to same sex lesbian couples).

<sup>115</sup> See CAHN, *NEW KINSHIP*, *supra* note 7, at 21 (stating that “[w]hile there are no reliable figures on who uses sperm banks, anecdotal evidence suggests that their usage by heterosexual couples is declining, while usage by single women and lesbians is increasing”).

recently surfaced as a very real by-product of alternative reproduction (and as a reason to regulate it), however, it has never once surfaced as even a distant by-product of one of family law's "most venerable doctrines"<sup>116</sup> (or as a reason to reform it).<sup>117</sup>

Similarly, roving sexual inseminators engage in sexual activity that could easily lead to the birth of hundreds of children who do not know each other — and who therefore engage in accidental incest. Indeed, it is entirely plausible that the circumstances motivating commentators to propose regulations of alternative reproduction *already exist today* in the context of sexual reproduction, namely, the birth of thousands of children who do not know, or who do not really know, who at least one of their biological progenitors is, and who for that reason might engage in consanguineous procreation. "[M]isattributed paternity — believing like Luke Skywalker that your father is someone other than who he is — is not an insignificant phenomenon," Professor Glenn Cohen writes, "with studies suggesting that it may affect as few as one percent and as many as thirty percent of the population, with most estimates clustering at two to five percent of the population."<sup>118</sup> Scientists call this a "non-paternity event,"<sup>119</sup> a phrase which describes the situation (and shock) that some people confront when they discover, as a result of genetic testing, that the man whom they long thought was their father is not,

<sup>116</sup> Appleton, *supra* note 114, at 287.

<sup>117</sup> That said, Professors Carbone and Cahn have criticized states that have made it difficult, if not impossible, for persons to rebut the paternal presumption, although not because the presumption could lead to accidental incest. See Carbone & Cahn, *Current Issue*, *supra* note 113, at 238–39. Carbone and Cahn have proposed eliminating the presumption and establishing mandatory paternity testing at a child's birth. See June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1013 (2003) (stating that "in an era in which biological connections are increasingly easy to determine, parental relationships should be based on truth and certainty rather than convenience or presumptions").

<sup>118</sup> Cohen, *Rethinking Anonymity*, *supra* note 86, at 443; see also MARTHA M. ERTMAN, *LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* 61 (2015) (stating that "[w]hile urban legend holds that as many as 10 percent of children are products of the mother's extramarital affair, a 2006 study suggests that mandatory genetic tests would unpleasantly surprise around 2 percent of husbands"); Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 315 n.106 (citing the most accurate misattributed paternity estimate as between 2–5% of the population).

<sup>119</sup> Steve Olson, *Who's Your Daddy?: The Unintended Consequences of Genetic Screening for Disease*, ATLANTIC (July 1, 2007), <http://www.theatlantic.com/magazine/archive/2007/07/who-s-your-daddy/305969/>.

in fact, their biological progenitor.<sup>120</sup> Even if misattributed paternity affects just one percent of the population — the low end of estimates — that would mean that of the 4,000,000 children born in 2013 in the United States,<sup>121</sup> 40,000 of them are not being fathered by the person whom they believe is their genetic progenitor.<sup>122</sup>

Thus contextualized, alternative reproduction's "slippery slope to incest" argument is a relatively weak one, as coital reproduction already makes slippage possible. If accidental incest were such a terrifying possibility, then one would expect commentators to be advocating the regulation of the activity that could more frequently lead to it: sexual procreation. No one, however, has ever seriously proposed that we regulate sexual procreation in order to thwart accidental incest in the way that commentators have proposed that we regulate alternative procreation.<sup>123</sup>

The incest prevention justification's under-inclusion could reflect a belief that non-sexual reproduction is deserving of less constitutional protection than sexual procreation. Glenn Cohen argues that Naomi Cahn "would be unlikely to endorse the view that reproduction through [reproductive] technologies is a 'lower status' kind of

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<sup>120</sup> Of course, because of the paternal presumption that man might still be those individuals' legal father, just not their biological progenitor.

<sup>121</sup> See BRADY E. HAMILTON ET AL., 63 NAT'L VITAL STAT. REP., BIRTHS: PRELIMINARY DATA FOR 2013, at 8 (2014), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63\\_02.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_02.pdf).

<sup>122</sup> As the Supreme Court recognized in *Nguyen v. Immigration & Nationalization Service*, it is "[not] always clear that even the mother will be sure of the father's identity." *Nguyen v. INS*, 533 U.S. 53, 65 (2001). Even if mothers have such identifying information, they are in no way legally obliged to contact the "fathers" of children born to them if they do not want to; nor are they legally obliged to tell their children about those men. As Justice Stevens argued in his *Caban v. Mohammed* dissent: "In many cases, only the mother knows who sired the child, and it will often be within her power to withhold that fact." *Caban v. Mohammed*, 441 U.S. 380, 404 05 (1979) (Stevens, J., dissenting) (emphasis added). These women are, however, required to reveal the identity of the father to the government if they apply for public assistance. Marsha Garrison, *Lawmaking for Babymaking: An Interpretative Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 907 n.326 (2000) (stating that "[p]aternity cooperation rules, which require public assistance applicants to cooperate in establishing paternity and securing support, necessarily apply only to public assistance recipients"). It is unclear whether a woman's failure to disclose a pregnancy to a man would amount to paternity fraud, as paternity fraud cases are typically brought by deceived men to disestablish paternity, not to establish it. See Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 194 95 (2004).

<sup>123</sup> Glenn Cohen has proposed such a registry in (partial) jest. See Cohen, *Rethinking Anonymity*, *supra* note 86, at 444 (stating that "my proposal is meant to provoke").

reproduction, worthy of less protection.”<sup>124</sup> Nevertheless, Cohen continues, Cahn’s arguments in support of mandatory donor registries — including her incest prevention argument — “might *sub silentio* depend on that premise.”<sup>125</sup> More relevant to the subject matter of this Article, numerous federal courts disposing of constitutional challenges to same-sex marriage prohibitions have found that states’ professed rationale for those prohibitions — procreation — is under-inclusive in a way that suggests that procreation is a proxy or “pretext” for constitutionally impermissible motivation, like moral disapproval or animus (for either same-sex marriage, homosexuality, or both).<sup>126</sup>

<sup>124</sup> *Id.* at 445; see also Mary Patricia Byrn & Rebecca Ireland, *Anonymously Provided Sperm and the Constitution*, 23 COLUM. J. OF GENDER & L. 1, 20 (2012) (stating that “[w]hile commentators supporting the ban [on anonymously provided sperm] have not expressly based their arguments on a lack of a fundamental right to procreate for persons who conceive via ART, their proposals are implicitly based on this damaging assumption”).

<sup>125</sup> Cohen, *Rethinking Anonymity*, *supra* note 86, at 445. In a more recent article, Professor Cahn argues in explicit terms that sexual and alternative reproduction are “different enough” to justify different legal treatment of them. In response to the objection that laws abolishing anonymity in the donor gamete context violate equal protection because they treat similarly situated procreators differently, Cahn writes: “The reality is that they are, in fact, different, and different enough to satisfy any level of constitutional scrutiny.” Naomi Cahn, *Do Tell! The Rights of Donor Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1106 (2014). The difference, in Cahn’s view, turns on both sex and third party involvement. She says: “Even children conceived through a one night stand involve a sexual encounter. By contrast, like adopted children, donor conceived children require the involvement of someone outside the family, a third party who is not within the protected sphere of sexually intimate conduct.” *Id.* An unpublished paper by the author contests the questionable binaristic logic on which Cahn’s (and others’) arguments are based. See generally Courtney Megan Cahill, *Reproduction Reconceived* (2015) (unpublished manuscript) (on file with author) (work in progress). For other scholars who have critiqued the sexual/non sexual reproduction binary, see Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 FAM. L.Q. 93 *passim* (2015); Martha M. Ertman, *Unexpected Links Between Baby Markets and Intergenerational Justice*, 8 L. & ETHICS OF HUM. RTS. 271, 272 (2014) (arguing that “more similarities exist between assisted and coital reproduction than people think, and therefore less reason for the state to depart from its general tendency to leave private family decisions to the private realm by interfering in baby making with purchased gametes”); *id.* (“Because limits on reproductive technologies involve state meddling in family building decisions that are all but unthinkable in coital reproduction, justice requires us to ask why law would impose coercive controls in one case and give freedom and privacy in the other.”). Professor Ertman elaborates on these arguments in her recent book, *LOVE’S PROMISES*. See generally ERTMAN, *supra* note 118.

<sup>126</sup> See, e.g., *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1289 (N.D. Fla. 2014) (stating that “defending the ban on same sex marriage on the ground that the capacity to procreate is the essence of marriage is the kind of position that, in another context, might support a finding for pretext,” that “[t]he undeniable truth is that the Florida



This Article is not suggesting that supporters of the accidental incest rationale are motivated by animus against non-traditional procreators or are using incest as a mere pretext for a constitutionally impermissible purpose. Nor does it take a position on whether the argument reflects an indefensible assumption that non-sexual procreation is deserving of less constitutional protection than that of the sexual variety. Rather, it simply suggests that the weaknesses of the incest prevention justification, and especially its under-inclusion, are an invitation to consider that justification's less obvious dimensions — moral and normative dimensions that emerge by situating incest prevention in a broader theoretical and historical context. That context, as the ensuing Parts show, suggests that incest emerges atavistically in debates over intimate and family life not because of persistent concerns about biology and genetic harm but rather because of persistent concerns about the structure and substance of the family.

The following Parts provide that context. They argue that the incest prevention rationale's principal function mirrors that of the taboo from which it emanates — familial establishment — and that viewing the incest prevention rationale through an establishment lens provides a basis for rejecting it on both normative and constitutional grounds. In elucidating the rich theoretical and legal ancestry of the contemporary incest prevention justification, the next Parts reveal the normative framework in which that argument is operating — as well as the values, constitutional and otherwise, at stake behind its deployment in debates over alternative reproduction.

### III. THE INCEST TABOO AND THE ESTABLISHMENT OF KINSHIP

This Part considers the incest taboo's productive, or establishment, function both in theory and in practice. Its objective is to shift the focus away from what the incest taboo prohibits (romance within the family) and toward what it creates (a romance about the family). All law simultaneously prohibits and produces; the incest taboo — the supreme law of the family — is no different. In this sense, the incest taboo serves a positive function that philosopher Michel Foucault attributes to power more generally. He says:

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ban on same sex marriage stems entirely, or almost entirely, from moral disapproval of the practice," and citing *United States v. Windsor*, 133 S. Ct. 2675 (2013), for the proposition that "moral disapproval, standing alone, cannot sustain a provision of this kind").

We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.<sup>127</sup>

It is this Part's objective to encourage readers to start thinking about the incest taboo, and the legal arguments that flow from it, in terms of a "production." Our cultural engagement with the incest taboo derives from one kind of production: the tragedy *Oedipus Rex*. The actual deployment of the incest taboo effectuates another kind of production: ideal forms of kinship. Section A summarizes the arguments of theorists who have approached the incest taboo in productive terms and who have conceptualized it as a way to establish the family (rather than as a way to avoid intra-familial sexual unions and their possible genetic consequences). Section B considers how the incest taboo has been used throughout the history of American family law in a productive way to establish the ideal family.

#### A. *The Incest Taboo's Establishment Function in Theory*

We can hardly be surprised if incest is being mobilized today in debates over alternative reproduction in a way that establishes the family, as establishment is precisely the kind of work that the incest taboo does. As several influential theorists have argued, the incest taboo is at least as much — if not more — about establishment as it is about prohibition. Some argue that it establishes gender, sexual identity, and society more generally. Others maintain that it establishes contemporary social relations (and hierarchies) between men and women. And still others argue that it establishes the family — and that it is increasingly being used in legal and political settings to do just that.

For Freud and his intellectual descendants in the psychoanalytic tradition, the incest taboo was instrumental in establishing "normal" gender and sexual identity. For them, the primal law against parent-child romance, otherwise known as the Oedipal complex, was as much about establishing gender and sexual identity as it was about prohibiting intra-familial romance.<sup>128</sup> A successful resolution of the

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<sup>127</sup> MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 194 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

<sup>128</sup> The Oedipal complex was used by Freud and his descendants to explain (and

complex, they maintained, resulted in the proper formation of gender identity — masculinity for boys and femininity for girls.<sup>129</sup> It also resulted in heterosexuality. “Psychoanalytic theory has always recognized the productive function of the incest taboo,” philosopher Judith Butler writes. “[I]t is what creates heterosexual desire and discrete gender identity.”<sup>130</sup>

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mandate) the psychosexual development of boys and girls. See Rubin, *supra* note 16, at 189 (stating that the “Oedipal complex is an apparatus for the production of sexual personality”). According to it, a boy initially desires his mother but eventually turns away from her and comes to identify with his father out of a castration fear. See *id.* at 193 (boys renounce the mothers “for fear that otherwise [their] father[s] would castrate [them] (refuse to give [them] the phallus and make [them become] girl[s])”); *id.* at 193 (“The boy exchanges his mother for the phallus. . . . The only thing required of him is a little patience. He retains his initial libidinal organization and the sex of his original love object. The social contract to which he has agreed will eventually recognize his own rights and provide him with a woman of his own.”). A girl also initially desires her mother, but eventually turns away from her and becomes desirous of her father. As with the boy and his mother, however, the girl must in time repress her desire for the opposite sex parent (father) and identify with the same sex parent (mother). See *id.* For Freud’s description of the Oedipal conflict, see SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* 383 84, 408 10 (James Strachey ed. & trans., Basic Books 2010) (1955); SIGMUND FREUD, *THE EGO AND THE ID* 26 36 (James Strachey ed., Joan Riviere trans., 1960); SIGMUND FREUD, *A GENERAL INTRODUCTION TO PSYCHOANALYSIS* 184 85, 289 96 (Joan Riviere trans., 1943).

<sup>129</sup> Freudian psychoanalysis posits that a successful resolution of the Oedipal complex occurs after children identify with their same sex parent. See CHARLES W. SOCARIDES, *THE OVERT HOMOSEXUAL* 74 76 (1968). Charles Socarides was a prominent psychiatrist and Freudian psychoanalyst who wrote several books on (and against) homosexuality and who was the co founder, along with Joseph Nicolosi and Benjamin Kaufman, in 1992 of the National Association for Research and Therapy of Homosexuality (“NARTH”), whose primary mission is to support gay conversion therapy. See WAYNE BESEN, *ANYTHING BUT STRAIGHT: UNMASKING THE SCANDALS AND LIES BEHIND THE EX GAY MYTH* 136 (2003); Margalit Fox, *Charles W. Socarides, Psychiatrist and Psychoanalyst, Is Dead*, N.Y. TIMES (Dec. 28, 2005), <http://www.nytimes.com/2005/12/28/nyregion/28socarides.html>. Socarides and his colleagues posited that a child’s failure to identify with his same sex parent would lead to homosexuality. See SOCARIDES, *supra*, at 38 (stating that “[t]he family of the homosexual is usually a female dominated environment wherein the father was absent, weak, detached or sadistic. . . . The father’s inaccessibility to the boy contributed to the difficulty in making a masculine identification”). A central tenet of NARTH is that men “become” gay, in part, because of absent fathers. See, e.g., Johanna K. Tabin, *Father Hunger and Homosexuality*, NARTH SCI. ADVISORY COMM. (Oct. 26, 2004), <http://www.narth.org/docs/fatherhunger2.html>. Charles Socarides’ son Richard Socarides is an attorney, LGBT rights activist, and former advisor to President Clinton on LGBT issues. See RICHARD SOCARIDES, <http://richardsocarides.com/> (last visited July 16, 2015).

<sup>130</sup> JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 97 (1999) [hereinafter *GENDER TROUBLE*]; see also *id.* at 96 (stating that “[t]he incest taboo is the juridical law that is said both to prohibit incestuous desires and to construct certain gendered subjectivities through the mechanism of compulsory

No less emphatic about the incest taboo's "productive function" was structural anthropologist Claude Lévi-Strauss, who argued in his master work, *The Elementary Structures of Kinship*,<sup>131</sup> that the incest taboo was responsible for no less than society itself. There, Lévi-Strauss repeatedly underscores the productive rather than the prohibitive aspects of the taboo, as when he remarks that incest prohibitions "are prohibitions only secondarily and derivatively. Rather than a prohibition on a certain category of persons," he says, the incest taboo is a "prescription directed towards another category."<sup>132</sup> He claims that intra-family marriage is "scarcely conceivable"<sup>133</sup> for persons in pre-modern society<sup>134</sup> not because it violates some intuitive moral sense, but rather because it frustrates the establishment of social networks.<sup>135</sup> Incest is "socially absurd *before* it is morally culpable," he writes.<sup>136</sup>

The respective fathers of psychoanalysis and structural anthropology thus together recognized — and, in the case of Lévi-Strauss, insisted upon — the incest taboo's productive dimension. Elaborating on their theories, feminist philosopher Gayle Rubin argues that the incest taboo has been responsible for establishing not just sexual identity and society, but also the social relations of sex and gender.<sup>137</sup> She contends

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identification") (emphasis added); Rubin, *supra* note 16, at 189 (stating that "[i]n the most general terms, the Oedipal complex is a machine which fashions the appropriate forms of sexual individuals").

<sup>131</sup> CLAUDE LÉVI STRAUSS, *THE ELEMENTARY STRUCTURES OF KINSHIP* 490 (Rodney Needham ed., James Harle Bell & John Richard von Sturmer trans., Beacon Press 1969) (1949).

<sup>132</sup> *Id.* at 485; *see also id.* at 51 ("[E]very negative stipulation of the [incest] prohibition has its counterpart. The prohibition is tantamount to an obligation, and renunciation gives rise to a counter claim.").

<sup>133</sup> *Id.* at 485.

<sup>134</sup> These are the persons who comprise Lévi Strauss's data set.

<sup>135</sup> Lévi Strauss recounts the response given by an Arapesh man to Margaret Meade when the latter asked him why men did not marry their sisters — a response that Lévi Strauss offers as proof of the incest taboo's socially productive purpose: "What, you would like to marry your sister! What is the matter with you anyway? Don't you want a brother in law? . . . With whom will you hunt, with whom will you garden, whom will you go to visit?" *Id.* at 485. Incest is "scarcely conceivable" for this man, Lévi Strauss says, because it frustrates the formation of social networks, not because it is inherently repulsive. *Id.*; *see also* Rubin, *supra* note 16, at 173–74 (stating that "in general sense [Lévi Strauss's] argument is that the taboo on incest results in a wide network of relations, a set of people whose connections with one another are a kinship structure").

<sup>136</sup> LÉVI STRAUSS, *supra* note 131, at 485.

<sup>137</sup> Rubin, *supra* note 16, at 183 (stating that "some basic generalities about the organization of human sexuality can be derived from an exegesis of Lévi Strauss's

that it is a mistake to view the incest taboo in prohibitive or negative terms; “incest taboos . . . cannot be explained as having the aim of preventing the occurrence of genetically close matings,” she insists.<sup>138</sup> Rather, one must view the taboo through an establishment lens, one which focuses less on what the taboo prohibits and more on what it creates: the “sex/gender system,” which Rubin defines as “the set of arrangements by which a society transforms biological sexuality into products of human activity.”<sup>139</sup>

Rubin argues that the sex/gender system is a by-product of the incest taboo and of the Freudian contention that the taboo establishes proper gender alignment and heterosexuality.<sup>140</sup> In her view, the very thing that was once used to establish society and sexual identity — the incest taboo — is still being used in the modern era to establish and govern social relations between men and women.<sup>141</sup> “The kinds of relationships of sexuality established in the dim human past,” Rubin says, “still dominate our sexual lives, our ideas about men and women, and the ways we raise our children.”<sup>142</sup> For this reason, she insists, to achieve equality women must first imagine a world where “the entire Oedipal drama would be a relic.”<sup>143</sup> Women must “[u]nite,” she says, “to [o]ff the Oedipal [r]esidue of [c]ulture.”<sup>144</sup>

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theories of kinship. These are the incest taboo, obligatory heterosexuality, and an asymmetric division of the sexes”); *see also id.* at 180 (arguing that “the incest taboo presupposes a prior, less articulate taboo on homosexuality” because “[a] prohibition against *some* heterosexual unions assumes a taboo against *non* heterosexual [ones]”); *id.* at 177 (stating that “[i]f Lévi Strauss is correct in seeing the exchange of women as a fundamental principle of kinship, the subordination of women can be seen as a product of the relationships by which sex and gender are organized and produced”).

<sup>138</sup> *Id.* at 173.

<sup>139</sup> *Id.* at 159.

<sup>140</sup> *See id.* at 183; *see also* BUTLER, *GENDER TROUBLE*, *supra* note 130, at 83–84 (arguing that the incest taboo “produces heterosexuality, and acts not merely as a negative or exclusionary code, but as a sanction and, most pertinently, as a law of discourse, distinguishing the speakable from the unspeakable . . . the legitimate from the illegitimate”).

<sup>141</sup> *See* BUTLER, *GENDER TROUBLE*, *supra* note 130, at 93 (stating that “Rubin understands psychoanalysis . . . to complement Lévi Strauss’s description of kinship relations”); *see also* Rubin, *supra* note 16, at 188 (stating that “psychoanalysis is the study of the traces left in the psyches of individuals as a result of their conscription into systems of kinship”); *id.* at 198 (observing that “our sex/gender system is still organized by the principles outlined by Lévi Strauss, despite the entirely nonmodern character of his data base”).

<sup>142</sup> Rubin, *supra* note 16, at 199.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 198.

More recently, Judith Butler has viewed the incest taboo in establishment terms, arguing that it is often used in contemporary legal and political debates to establish both what the family is and what it ought to be. Where Rubin argues that the incest taboo establishes our ideas about sex, gender, and sexuality, Judith Butler argues that it establishes our ideas about the family. Incest and its persistent threat, she suggests, have been mobilized by critics of non-traditional families in myriad ways to justify legal restrictions on them, including gay marriage restrictions and restrictions on alternative reproduction.<sup>145</sup>

Sometimes, for instance, incest is presented by critics of non-traditional families as an analogue to other forms of deviant kinship. Butler writes:

[W]hat concerns me most is that the term “incest” is overinclusive; that the departure from sexual normalcy it signifies *blurs too easily with other kinds of departures*. Incest is considered shameful, which is one reason it is so difficult to articulate, but to what extent does it become stigmatized as a sexual irregularity that is terrifying, repulsive, unthinkable *in the ways that other departures from normative exogamic heterosexuality are?*<sup>146</sup>

Or, as she elsewhere suggests:

[T]he horror of incest, the moral revulsion it compels in some, is not that far afield from the same horror and revulsion felt toward lesbian and gay sex, and is not unrelated to the intense moral condemnation of voluntary single parenting, or gay parenting, or parenting arrangements with more than two adults involved (practices that can be used as evidence to support a claim to remove a child from the custody of the parent in several states in the United States). *These various modes in which the oedipal mandate fails to produce normative family all risk entering into the metonymy of that moralized*

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<sup>145</sup> For a recent commentary on Butler's work on the incest taboo and the establishment of kinship, see generally Terrell Carver & Samuel A. Chambers, *Kinship Trouble: Antigone's Claim and the Politics of Heteronormativity*, 3 *POLITICS & GENDER* 427 (2007).

<sup>146</sup> JUDITH BUTLER, *UNDOING GENDER* 157 (2004) [hereinafter *UNDOING GENDER*] (emphasis added).

*sexual horror that is perhaps most fundamentally associated with incest.*<sup>147</sup>

Other times, Butler argues, incest is presented by critics of non-traditional families as their tragic result. Critics of gay parenthood, for instance, “commonly maintain that alternative kinship arrangements attempt to revise psychic structures *in ways that lead to tragedy again*, figured incessantly as the tragedy of and for the child.”<sup>148</sup> Their arguments, she says, portend that “any children raised in a gay family [will] run the . . . threat of psychosis, as if some structure, necessarily named ‘Mother’ and necessarily named ‘Father,’” were required for “normal” psychological development.<sup>149</sup>

These kinds of arguments, which pervade anti-same-sex marriage advocacy as well as arguments against alternative reproduction and non-biological parenthood,<sup>150</sup> position the incest taboo and normative kinship in a feedback loop. The incest taboo creates normative kinship (proper gender alignment, heterosexuality, and, eventually, dual-gender parenthood); normative kinship, in turn, insures that the incest taboo is working — and that children will continue to fall in love with the right person. Under this view, non-traditional kinship, like gay parenting, begets non-traditional kinship, including incest and homosexuality. By contrast, traditional kinship — straight parenting — begets traditional kinship, including extra-familial intimacy and heterosexuality. Thus understood, the argument that gay marriage leads to incest,<sup>151</sup> or that gay parents create gay children,<sup>152</sup> begins to make more sense.

It is against this backdrop that Butler considers the incest taboo’s “establishment” dimension. She says:

<sup>147</sup> BUTLER, *ANTIGONE’S CLAIM*, *supra* note 19, at 71 (emphasis added); *see also* BUTLER, *UNDOING GENDER*, *supra* note 146, at 160 (observing that the incest taboo “exposes the aberration in normative kinship”).

<sup>148</sup> BUTLER, *ANTIGONE’S CLAIM*, *supra* note 19, at 70 (emphasis added).

<sup>149</sup> *Id.*

<sup>150</sup> The idea that same sex marriage harms children because it fails to provide them with dual gender parenting pervades anti same sex marriage advocacy. *See* NeJaime, *Marriage, Biology*, *supra* note 31, at 91; Deborah Widiss, Elizabeth N. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 490–92 (2007).

<sup>151</sup> *See* Cahill, *Same Sex Marriage, Slippery Slope Rhetoric*, *supra* note 3, at 1550–61 (surveying the slippery slope to incest argument in anti marriage equality advocacy).

<sup>152</sup> *See* Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 294–311 (2009).

It is, of course, one function of the incest taboo to prohibit sexual exchange among kin relations or, rather, *to establish kin relations precisely on the basis of those taboos*. The question, however, is whether *the incest taboo has also been mobilized to establish certain forms of kinship as the only intelligible and livable ones*.<sup>153</sup>

Butler returns to this “establishment” idea in a more recent work, where she writes: “What I want to underscore here is the use of Oedipus *to establish a certain conception of culture* that has rather narrow consequences for . . . gender and sexual arrangements.”<sup>154</sup> The “law that would secure the incest taboo as the foundation of symbolic family structures,” she says, “states the universality of the incest taboo as well as its necessary symbolic consequences.”<sup>155</sup> One of those consequences is the establishment of the ideal household and the simultaneous denigration “of lesbian and gay forms of parenting, single-mother households, [and] blended family arrangements in which there may be more than one mother or father.”<sup>156</sup>

In elucidating the incest taboo’s establishment function, Butler places herself in a line of thinkers that includes Freud (and his descendants), Lévi-Strauss, and Rubin, all of whom have similarly understood the taboo in productive terms. *They* identified the ways in which it establishes sexual identity, society, and the social relations between men and women. *She* furthers their project by identifying the ways in which it establishes the family.<sup>157</sup>

#### B. The Incest Taboo’s Establishment Function in Practice

Butler’s insight that the incest taboo has been used to establish normative kinship no less than it has been used to prohibit intra-

<sup>153</sup> BUTLER, ANTIGONE’S CLAIM, *supra* note 19, at 70 (emphasis added).

<sup>154</sup> BUTLER, UNDOING GENDER, *supra* note 146, at 119.

<sup>155</sup> *Id.* at 158.

<sup>156</sup> *Id.*

<sup>157</sup> Like Rubin, Butler is interested in the way in which old theories about incest have been “revived and redeployed” in debates over non traditional kinship. *Id.* at 119. It is important to note, however, that Butler does not hold Lévi Strauss accountable for the conservative uses to which his theory of the incest taboo has been put, particularly by contemporary writers in these debates. She says: “My point is less to hold the views of Lévi Strauss responsible for the terms of the present debate [over gay parenting] than to ask what purpose the reanimation of these views serves within the contemporary political horizon, considering that in anthropology, the Lévi Straussian views promulgated in the late 1940s are generally considered surpassed and are no longer owned in the same form by Lévi Strauss himself.” *Id.*



familial romance helps explain the dogged persistence of incest-based arguments in American family law. The taboo dominated family law debates in the past, and, as this Article has already shown, it continues to do so today.

For instance, nineteenth-century courts routinely upheld civil and criminal anti-miscegenation laws by adverting to incest; as the Tennessee Supreme Court declared in 1872, recognizing inter-racial marriage would result in a situation where “the father [was] living with his daughter, the son with the mother, the brother with the sister.”<sup>158</sup> More recently, incest has played a role in arguments against legalizing same-sex intimacy<sup>159</sup> and same-sex marriage;<sup>160</sup> it even surfaced as a concern of Justice Sotomayor — a left-leaning Justice — in oral arguments in *United States v. Windsor*.<sup>161</sup> Finally, incest has figured in arguments against certain methods of alternative reproduction, including anonymous gamete donation (as we have already seen)<sup>162</sup> and human reproductive cloning.<sup>163</sup> If Butler is right,

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<sup>158</sup> *State v. Bell*, 66 Tenn. 9, 11 (1872). For incest’s role in slippery slope rhetoric against inter racial relationships, see Cahill, *Same Sex Marriage, Slippery Slope Rhetoric*, *supra* note 3, at 1555–57. In the nineteenth century miscegenation and incest were not just causally related — such that the recognition of the former was thought to lead inexorably to the recognition of the latter — but interchangeable. *See id.* at 1588–91.

<sup>159</sup> No less an authority than the Supreme Court of the United States adverted to incest in support of sodomy bans in *Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986). Justice Scalia inveighed against this same possibility in his *Lawrence v. Texas* dissent, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting), as did then Senator Rick Santorum in the months leading up to that landmark decision. *See Excerpt from Santorum Interview*, ASSOCIATED PRESS (Apr. 23, 2003, 10:37 AM), [http://usatoday30.usatoday.com/news/washington/2003\\_04\\_23\\_santorum\\_excerpt\\_x.htm](http://usatoday30.usatoday.com/news/washington/2003_04_23_santorum_excerpt_x.htm).

<sup>160</sup> More recently, incest has resurfaced in the wake of the marriage equality movement. *See* Bo Suh, *Texas Legislators Argue Same Sex Marriage Leads to Incest, Polygamy, Bestiality*, HRC BLOG (Aug. 6, 2014), <http://www.hrc.org/blog/entry/texas-legislators-argue-same-sex-marriage-leads-to-incest-polygamy-pedophil>. Not all courts agree. *See In re Marriage Cases*, 43 Cal. 4th 757, 829 n.52 (2008) (rejecting the slippery slope from same sex marriage to incest argument).

<sup>161</sup> *See supra* note 3 and accompanying text.

<sup>162</sup> *See supra* notes 54–69 and accompanying text. Incest became a concern for those suspicious of artificial insemination in the 1950s and 1960s. *See supra* notes 38–40 and accompanying text. Although alternative insemination existed well before the twentieth century, *see* Bernstein, *Socio Legal Acceptance*, *supra* note 39, at 1048, it did not raise incest fears until the middle of the twentieth century, and even then those fears were raised primarily by legal scholars, not the general public. *See id.* at n.17. For an ethnographical study of one town’s struggle with incest anxiety arising from the advent of new reproductive technologies, *see* generally Jeanette Edwards, *Incorporating Incest: Gamete, Body and Relation in Assisted Conception*, 10 J. ROYAL ANTHROPOLOGICAL INST. 755 (2004).

then incest's continual emergence in American family law indicates a persistent need to establish the family and to discipline domestic outliers, particularly during moments when the family's traditional form is subject to change.<sup>164</sup> Even as the taboo exits one proverbial stage (the miscegenation context), it quite predictably reappears on another (the alternative reproduction context).

Significantly, even though actors have invoked the incest taboo as a reason not to recognize non-traditional kinship, incest, it seems, is rarely those actors' chief concern. For instance, racist radicals consistently raised the specter of incest as a reason to prohibit inter-racial relationships. If anything, however, anti-miscegenation laws increased, not decreased, the likelihood of incest. In mandating intra-racial intimacy, anti-miscegenation laws reduced the number of available partners in the dating pool for everyone but especially for whites, who were prohibited from maintaining intimate relationships with anyone but themselves.<sup>165</sup> Moreover, anti-miscegenation laws

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<sup>163</sup> The late Leon Kass offered incest as a reason to limit human reproductive cloning, asking: "What will happen when the adolescent clone of Mommy becomes the spitting image of the woman Daddy once fell in love with?" *Human Cloning: Hearing Before the Subcomm. on Sci., Tech., and Space of the S. Comm. on Commerce, Sci., and Transp.*, 107th Cong. 48 (2001) (statement of Leon R. Kass), available at [http://www.gpo.gov/fdsys/pkg/CHRG\\_107shrg88708/pdf/CHRG\\_107shrg88708.pdf](http://www.gpo.gov/fdsys/pkg/CHRG_107shrg88708/pdf/CHRG_107shrg88708.pdf); see also *Science and Ethics of Human Cloning: Hearing Before the Subcomm. on Sci., Tech., and Space of the S. Comm. on Commerce, Sci., and Transp.*, 108th Cong. 33 41 (2003), available at [http://www.gpo.gov/fdsys/pkg/CHRG\\_108shrg95238/pdf/CHRG\\_108shrg95238.pdf](http://www.gpo.gov/fdsys/pkg/CHRG_108shrg95238/pdf/CHRG_108shrg95238.pdf). In Kass's view, human reproductive cloning not only precipitates incest but is tantamount to it in the "repugnance" that it elicits. He says: "Can anyone really give an argument fully adequate to the horror which is father daughter incest (even with consent) . . . ? The repugnance at human cloning belongs in that category." LEON KASS & JAMES Q. WILSON, *THE ETHICS OF HUMAN CLONING* 18 (1998).

<sup>164</sup> Incest fears have also been provoked by changes in cultural conceptions of the family and by economic changes in society more generally. See Ruth Perry, *Incest as the Meaning of the Gothic Novel*, 39 *EIGHTEENTH CENTURY* 261, 263 64 (1998) (explaining the prevalence of incest themes in numerous eighteenth century texts as a reflection of writers' keen awareness of the transformation of the family that was taking place at this time and of the new realities of commercialism). In some eighteenth century texts, incest was idealized and romanticized. See BUTLER, *UNDOING GENDER*, *supra* note 146, at 159 (observing that "brother/sister incest in eighteenth century literature . . . sometimes appears as idyllic").

<sup>165</sup> For instance, the anti miscegenation law at issue in *Loving v. Virginia* prohibited "any white person [from] intermarry[ing] with a colored person, or any colored person [from] intermarry[ing] with a white person," but allowed any "colored person" to marry any other "colored person." *Loving v. Virginia*, 388 U.S. 1, 4 (1967). Indeed, it was for this reason that the Supreme Court found that Virginia's anti miscegenation statute was nothing more than an endorsement of White Supremacy. See *id.* at 11. Commentators have also observed the connections between incest and laws against

created a culture of secrecy around the very thing — miscegenation — that was prohibited yet also widely practiced; such secrecy, in turn, created the conditions for incest to occur.<sup>166</sup> These inconsistencies between rhetoric and reality have prompted some scholars to speculate that racists deployed incest in arguments against miscegenation not because they were really worried about intra-family romance and its deleterious genetic consequences. Rather, these scholars suggest, racists deployed incest in anti-miscegenation arguments because incest had the power to “emotionalize” the miscegenation issue.<sup>167</sup> Moreover, incest functioned as a “metaphor” for racist radicals’ true horror: inter-racial intimacy and reproduction.<sup>168</sup>

Similarly, consider the role that incest has more recently played in driving arguments against marriage equality for same-sex couples. As mentioned above, incest routinely appears at the bottom of the slippery slope down which same-sex marriage will putatively lead the nation.<sup>169</sup> Remarkably, though, courts in the same state have at once recognized what would otherwise qualify as an incestuous marriage in their jurisdiction — first-cousin-marriage — *and* used the possibility of that marriage in that state as one of the many reasons to reject same-sex couple plaintiffs’ constitutional claims to marriage equality.

For instance, in 2014, a federal district court in New Orleans refused to find that same-sex marriage was a fundamental right under the federal Constitution, reasoning, in part, that were the court to find that a broad right to marry existed under the Fourteenth Amendment, the state would be unable to regulate marriages that cause “significant

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inter racial intimacy. See BUTLER, *UNDOING GENDER*, *supra* note 146, at 122 (observing that “the incest taboo mandates exogamy, but the taboo against miscegenation limits the exogamy that the incest taboo mandates”); WERNER SOLLORS, *NEITHER BLACK NOR WHITE YET BOTH* 322 (1997) (observing that “since miscegenation must be avoided at all cost, incest (racially enlarged) becomes an ideal almost by necessity”).

<sup>166</sup> See SOLLORS, *supra* note 165, at 303 (observing that “the possibility of sibling incest in a younger generation [often resulted] from the secrecy of miscegenation of [the prior generation of] elders”); *id.* at 318 (stating that “[i]ncest is horrifying, and the fact that miscegenation takes place outside of legal sanctions makes this terrible event more likely”); Zanita E. Fenton, *An Essay on Slavery’s Hidden Legacy: Social Hysteria and Structural Condonation of Incest*, 55 HOW. L.J. 319, 321 (2012) (observing and documenting the causal relationship between anti miscegenation laws and incest).

<sup>167</sup> SOLLORS, *supra* note 165, at 316.

<sup>168</sup> For “racist radicals,” Sollors contends, incest functioned as “the perfect metaphor for expressing their horror” over inter racial intimacy. Miscegenation was the “true horror,” and incest merely the vehicle “through which [that] horror [could] be . . . expressed.” *Id.* at 320.

<sup>169</sup> See *supra* note 3 and accompanying text.

societal harms,” including “marriages between . . . first cousins.”<sup>170</sup> Just a few years earlier, however, a Louisiana court refused to apply that state’s strong public policy against first-cousin marriage to an Iranian first-cousin marriage, reasoning that first-cousin “marriages are not so ‘odious’ as to violate a strong public policy of this state.”<sup>171</sup>

That the *threat* of incest subsists as a reason to prevent same-sex marriage in a state where *actual incest* is legally recognized raises the question of what incest is doing in arguments over same-sex marriage. Indeed, the role that incest once played in sustaining criminal anti-miscegenation laws, and continues to play in shoring up marriage inequality, suggests that incest often functions as a placeholder for anxiety over something other than incest — often enough to prove Gayle Rubin’s and Judith Butler’s point that incest anxiety is rarely about incest and its biological consequences.<sup>172</sup> In their view, the incest taboo is typically mobilized to establish the ideal family rather than to prevent incest, and incest anxiety is typically a proxy for another set of concerns — concerns that have little to do with incest and that usually relate to familial, rather than to genetic, abnormality.<sup>173</sup>

<sup>170</sup> *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 922 n.13 (E.D. La. 2014).

<sup>171</sup> *Ghassemi v. Ghassemi*, 998 So. 2d 731, 749 50 (La. Ct. App. 2008); *see also* Steve Sanders, *The Constitutional Right to (Keep Your) Same Sex Marriage*, 110 MICH. L. REV. 1422, 1438 (2012) (arguing that “while states nominally retain the right to bar recognition of strongly disapproved marriages [under the public policy exception], in practice the modern trend has been in favor of validating marriages whenever possible. . . . Only with same sex marriages have states imposed emphatic and inflexible rules of nonrecognition”).

<sup>172</sup> As Rubin puts it, “incest taboos . . . cannot be explained as having the aim of preventing the occurrence of genetically close matings.” Rubin, *supra* note 16, at 173.

<sup>173</sup> Oxford historian Sybil Wolfram makes a somewhat related point in her fascinating study of English incest laws, which, she posits, were not motivated by genetic concerns but rather by shifts in “popular conceptions of kinship.” SYBIL WOLFRAM, IN *LAWS AND OUTLAWS: KINSHIP AND MARRIAGE IN ENGLAND* 146 (1987). She says:

[T]he use of the biological ill effects of in breeding in political settings followed, rather than preceded, the replacement of the old categories of consanguinity and affinity by consanguinity alone as the basis for the prohibition, and it seems likely that the voicing of the belief, if not the belief itself, was a consequence of the severing of affinity from consanguinity. The sequence of events is not that scientific discovery created the belief in the biological ill effects of in breeding and the belief in turn altered the law and common thinking towards resting the law on consanguinity (alone). Rather, after the law and popular conceptions of kinship had changed, an old belief (that incest produces idiot children) in a new scientific guise (that this occurs by biological mechanisms), became a useful tool.

Today's version of the Oedipal drama — the accidental incest prevention rationale — is similar. It, too, signifies concerns other than incest. And it, too, is being used to establish the family.

#### IV. THE INCEST PREVENTION JUSTIFICATION AND THE ESTABLISHMENT OF KINSHIP

Building on the connections between incest and establishment that were made in the previous Part, this Part now turns to the more specific and concrete ways in which incest establishes the family in the context of alternative reproduction. Specifically, it elucidates two kinds of establishment that follow from the deployment of the incest prevention justification in the alternative procreation setting. Section A argues that the incest prevention justification establishes the traditional family — married parents and their biological children, sexually conceived — as *the ideal* family. Section B argues that the incest prevention justification establishes the donor network as *a* family.

##### A. *Establishing the Traditional Family as the Ideal Family*

Establishing the traditional, nuclear family is the avowed goal of some of those who embrace the incest prevention justification as a reason to regulate alternative reproduction. Consider in this regard the Institute for American Values, whose invocation of the incest prevention justification is just one aspect of a larger regulatory vision that advocates the elimination of alternative reproduction for those who cannot replicate biological, dual-gendered parenthood. For the Institute and its adherents, incest prevention intersects and overlaps with other arguments in favor of regulating alternative reproduction *in order to reproduce* the traditional family.

For example, in addition to discussing the incestuous consequences of anonymous sperm donation, the Institute also champions what it conceives to be the traditional family. The authors open the section of *One Parent or Five* that addresses single mothers by choice by celebrating marriage and family:

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*Id.* Wolfram argues that something other than genetic concerns prompted English legislators in the early twentieth century to press for *decreased* regulation of affinity (or marriage ) based relationships. This Article makes a similar (but opposite) point, namely, that something other than genetic concerns — indeed, something other than incest — is prompting commentators today to argue in favor of *increased* regulation of certain aspects of alternative reproduction.

When at all possible, the married mother and father usually opt to conceive children the old-fashioned way, through sexual intercourse (or what our parents' generation quaintly called 'making love'). The married mother and father can be found pretty much everywhere, from the parks of San Francisco and Seattle to the streets of the edgiest neighborhoods of New York. Diverse and resilient, the married mother and father family has for millennia put down roots everywhere in the world. Generally thriving wherever planted, the fruit this family produces — children — is among the hardiest and healthiest in the world.<sup>174</sup>

Similar remarks recur throughout other publications by the primary author of *One Parent or Five*, Elizabeth Marquardt, who has argued in various media outlets against the deliberate creation of “motherless” and “fatherless” families through practices like anonymous egg and sperm donation to same-sex couples. For instance, in one recent *Atlantic* piece, *Do Mothers Matter?*,<sup>175</sup> Marquardt argues that “surrogacy and egg donation . . . are bringing into the world a class of children beset by confusion, depression, and loss.”<sup>176</sup> She there presents the stories of men — mostly gay — who have used surrogates and anonymous egg donors to have children. Playing on the common anti-gay stereotype of the affluent gay man,<sup>177</sup> Marquardt queries: “Generally moneyed and armed with a team of baby nurses, nannies, and house cleaners, most of these fathers probably do fine in providing material comfort, opportunity, and a loving home for the children. But what about the children? Do their mothers matter to them?”<sup>178</sup> Marquardt laments the “equal opportunity run on deliberately conceiving motherless children,” characterizing “the practices of surrogacy and [anonymous] egg donation” as a “tragedy” on par with other situations where children are maternally bereft, as

<sup>174</sup> MARQUARDT, ONE PARENT OR FIVE, *supra* note 60, at 23.

<sup>175</sup> Elizabeth Marquardt, *Do Mothers Matter?*, ATLANTIC (Feb. 10, 2012), <http://www.theatlantic.com/health/archive/2012/02/do-mothers-matter/252676/> [hereinafter *Do Mothers Matter?*]; see also Karen Clark & Elizabeth Marquardt, *The Sperm Donor Kids Are Not Really All Right*, SLATE (June 14, 2010), [http://www.slate.com/articles/double\\_x/doublex/2010/06/the\\_spermdonor\\_kids\\_are\\_not\\_really\\_all\\_right.html](http://www.slate.com/articles/double_x/doublex/2010/06/the_spermdonor_kids_are_not_really_all_right.html); Elizabeth Marquardt, *Sperm Donor Kids Speak Out: Our Biological Dads Matter to Us*, HUFFINGTON POST (Jan. 19, 2011), [http://www.huffingtonpost.com/elizabeth-marquardt/anonymouslyconceived\\_youn\\_b\\_810463.html](http://www.huffingtonpost.com/elizabeth-marquardt/anonymouslyconceived_youn_b_810463.html).

<sup>176</sup> Marquardt, *Do Mothers Matter?*, *supra* note 175.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

when “children have been denied their mothers because of class biases . . . racial and ethnic biases . . . [or] as part of severe civil conflict.”<sup>179</sup>

Similar remarks appear throughout amicus briefs submitted to the Supreme Court in recent marriage equality cases. These briefs oppose marriage for same-sex couples and cite to the Institute’s publications on alternative reproduction as authority for arguments in support of traditional marriage. For instance, one brief submitted to the Supreme Court in *Hollingsworth v. Perry* and *United States v. Windsor* cites to *My Daddy’s Name is Donor* for the proposition that there are “psychological benefits associated with being raised by one’s biological [mother and father].”<sup>180</sup> Another cites to that same publication when identifying the perils of “redefining marriage in a way that de-links sex, marriage and children.”<sup>181</sup> While the Institute might no longer oppose gay marriage,<sup>182</sup> its publications on alternative reproduction have been increasingly cited by gay marriage opponents.

On this latter point, it is worth considering that the Institute has turned to the same arguments that it once used against same-sex marriage to argue against certain aspects of alternative reproduction. For example, in testifying against same-sex marriage during the federal trial in *Perry v. Schwarzenegger*,<sup>183</sup> David Blankenhorn averred that Proposition 8 was constitutional because same-sex marriage could not replicate the biological family; as he stated: children have a right “to know and be known by the two people who brought [them] into this world.”<sup>184</sup> Similarly, in an earlier speech delivered to the Danish Institute for Human Rights, Blankenhorn warned of the negative consequences that same-sex marriage would have on biological, dual-gendered parenthood, arguing that equal marriage rights for same-sex couples would not only further “the marketization and commodification of human reproduction” but also “erase[] the

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<sup>179</sup> *Id.*

<sup>180</sup> Amicus Curiae Brief of Coalition for the Protection of Marriage in Support of *Hollingsworth* and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 23, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) & *United States v. Windsor*, 133 S. Ct. 2675 (No. 12-307).

<sup>181</sup> Brief of Amicus Curiae Helen M. Alvaré in Support of *Hollingsworth* and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 23, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) & *United States v. Windsor*, 133 S. Ct. 2675 (No. 12-307).

<sup>182</sup> See *supra* notes 51-53.

<sup>183</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff’d*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

<sup>184</sup> Transcript of Proceedings at 2745, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09 2292 VRW).

biological basis of parenthood from law” and frustrate every child’s “right to a natural biological heritage, defined as the union of the father’s sperm and the mother’s egg.”<sup>185</sup>

Significantly, Blankenhorn repeats these exact sentiments in the recent *New York Times* opinion piece in which he announces his support for same-sex marriage. Blankenhorn concludes that Op-Ed by asking people to stop fighting against same-sex marriage and to start supporting biological parenthood: “Can we discuss whether both gays and straight people should think twice before denying children born through artificial reproductive technology the right to know and be known by their biological parents?”<sup>186</sup> He also there states that “[n]o same-sex couple, married or not, can ever under any circumstances combine biological, social and legal parenthood into one bond” and that same-sex marriage “effaces [the] gift” that marriage ought to bestow on a child: guaranteeing that “[t]he man and the woman whose sexual union made [the child] will also be there to love and raise [the child].”<sup>187</sup> Nevertheless, Blankenhorn says in his Op-Ed, marriage equality for gays and lesbians is an institution that he now supports.

Remarks like these suggest that alternative reproduction has become the new resting place for Blankenhorn’s (and the Institute’s) anxiety over unconventional kinship. They also suggest that conservatives like Blankenhorn who now support marriage equality favor a cabined and contained right to marry rather than a more expansive right to familial self-definition — the sort of right that has emerged from recent

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<sup>185</sup> David Blankenhorn, *The Rights of Children and the Redefinition of Parenthood*, AM. VALUES 57 (June 2, 2005), available at [http://americanvalues.org/catalog/pdfs/family\\_humanrights.pdf](http://americanvalues.org/catalog/pdfs/family_humanrights.pdf).

<sup>186</sup> Blankenhorn, *supra* note 2. It is hard to say what Blankenhorn intends with this concluding plea. On the one hand, he could, like Naomi Cahn, simply be making an argument for eliminating anonymous gamete donation and for giving donor conceived children the opportunity to know who their biological progenitors are. On the other hand, he could be making an argument for abolishing all gamete donation, thereby eliminating the conditions which help create non biological parenthood in the first place. Under this latter view, children ought to be given the “gift” of being raised by and not just knowing their biological progenitors. *Id.* (stating that “[a]t the level of first principles, gay marriage effaces [the] gift” of “unit[ing] the biological, social and legal components of parenthood into one lasting bond”). This second possibility seems more plausible than the first, given that Blankenhorn and his Institute have argued against non biological parenthood writ large in the above discussed publications and not just against certain aspects of it, like anonymity in gamete donation.

<sup>187</sup> *Id.*



marriage equality jurisprudence, as argued below.<sup>188</sup> The same arguments that were once used to establish the traditional family in the same-sex marriage context, including the incest prevention justification, are now being used to establish that same family in the alternative reproduction context. To be sure, the incest prevention justification sounds more objective and neutral than some of the more transparently ideological arguments against non-traditional kinship discussed above. However, that justification's context and history suggest that it is being mobilized (by some actors) to establish the same kind of family that those more transparent arguments explicitly valorize: married parents and their biological children, conceived "the old-fashioned way."<sup>189</sup>

*B. Establishing the Donor-Conceived Network as Family*

In addition to establishing the traditional family as the ideal family, the incest prevention justification also establishes the donor-conceived network as a family. More specifically, the argument from incest assumes that gamete donation creates unintended "families,"<sup>190</sup> as incest is defined above all else as a familial crime.<sup>191</sup> "[T]he very existence of a taboo against incest," Judith Butler writes, "presumes that a family structure is already there, for how else would one understand the prohibition on sexual relations with members of one's own family without a prior conception of family?"<sup>192</sup> Thus, to argue that sexual relationships between two donor-conceived individuals (two "siblings"), or between a donor and the person conceived from his or her gametes (a "parent" and his/her "child"), is "incest," is to assume that these individuals are, in fact, family members.

Current law, however, is far from settled on the precise legal relationship that exists between such persons. For instance, it is

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<sup>188</sup> On this point, see Franklin, *supra* note 23, at 828.

<sup>189</sup> MARQUARDT, ONE PARENT OR FIVE, *supra* note 60, at 23.

<sup>190</sup> By "unintended" families, this Article means the persons in the donor network who do not intend to be in a family, for example, individuals conceived from the same donor but who have different legal parents.

<sup>191</sup> See Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1504 (1998) (stating that "[i]n 1793, [i]ncest was a crime grounded in principles of morality, property, and the laws governing inheritance" but "[b]y the end of this century, the crime had been transformed into a crime against the person: a very personal kind of sexual assault against the body, usually of a child"); Dubber, *supra* note 103, at 742 (stating that "[i]ncest . . . if it is to be a crime, is generally categorized not as a crime against autonomy and sexual autonomy, in particular, but as a crime against the family").

<sup>192</sup> BUTLER, UNDOING GENDER, *supra* note 146, at 157.

unclear whether donor-conceived individuals would qualify as “siblings” under state incest laws.<sup>193</sup> Incest statutes do not define who siblings are, other than to state that sexual relationships (or marriage) between “brothers” and “sisters” “of the whole or of the half-blood” are prohibited.<sup>194</sup> The phrase “of the whole or of the half-blood” fails to adequately define who “brothers” and “sisters” are, as it simply refers to individuals who are related by at least one common ancestor. In addition, that phrase typically applies under incest laws to non-sibling relationships as well, including relationships between individuals and their nieces or nephews “of the whole or [of the] half-blood.”<sup>195</sup> In other words, the phrase “of the whole or of the half-blood” does not define “brother” and “sister”; rather, it simply qualifies those terms.

Perhaps we are to assume that for the purpose of incest laws siblings are those people who are descended from a common “ancestor” or “parent.” Even in that case, though, it is not clear that donor-conceived individuals are descended from a common “parent.” The anonymous donors from commercial sperm banks that exponents of the accidental incest rationale are especially worried about are not treated as legal parents in any jurisdiction.<sup>196</sup>

In addition, in many settings, it is often the case that individuals who descend from the same biological progenitor are not treated as related because they do not share the same legal parent. For instance, in the adoption context, “[w]hen siblings are adopted into separate families, many states . . . treat the sibling relationship as terminated.”<sup>197</sup> This suggests that in some jurisdictions the legal relationship between “brothers” and “sisters” is based on legal parentage, not on a blood tie.<sup>198</sup> Federal immigration law follows this

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<sup>193</sup> See CAHN, *NEW KINSHIP*, *supra* note 7, at 118 (observing that “when it comes to donor conceived offspring, coverage [of state incest laws] is similarly unclear: the ban may not cover siblings who grow up in different families, nor those who are related by a half, rather than a full, genetic tie. Consequently, not all states might bar relationships between donors and their children, nor between donor related siblings”).

<sup>194</sup> See, e.g., ALA. CODE § 13A-13-3 (2015) (prohibiting marriages and sexual relationships between an individual and “(1) [h]is ancestor or descendant by blood or adoption; or (2) [h]is brother or sister of the whole or half blood or by adoption; or (3) [h]is stepchild or stepparent, while the marriage creating the relationship exists; or (4) [h]is aunt, uncle, nephew or niece of the whole or half blood”).

<sup>195</sup> See *id.*

<sup>196</sup> See Polikoff, *supra* note 39, at 240-41.

<sup>197</sup> Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 908 (2012).

<sup>198</sup> See James G. Dwyer, *Reforming Parentage Laws: A Child Centered Approach to*

approach as well, treating the legal relationship between biological siblings as severed upon adoption because of the change in parental status that adoption entails.<sup>199</sup>

Applying this logic to the donor-conceived context, it would appear that individuals conceived from the same donor gametes, but raised in separate legal families, are not siblings because they lack a legal relationship to a common parent. Indeed, they are even less related than the individuals in the adoption scenarios discussed above because donor-conceived individuals never shared a legal parent at all. Whereas individuals born to the same parents but adopted into different families are related at birth, donor-conceived individuals lack even that temporary connection.

At the same time, though, there are also instances where courts have applied incest laws purely on the basis of biology, even where the legal relationship between individuals had been severed — or, in some cases, had never existed at all.<sup>200</sup> These cases suggest that donor-

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*Parentage Law*, 14 WM. & MARY BILL RTS. J. 843, 853 (2006). Some courts have found that adoption also severs the legal relationship between biological parents and their children. For example, in one case, a court held that a criminal incest law did not apply to a sexual relationship between a defendant and his biological “daughter” because she was adopted by another family and therefore no longer a “daughter” to the defendant. See *State v. Fischer*, 493 N.E.2d 1265, 1266 (Ind. Ct. App. 1986) (stating that “the adopted child is the same as dead to its [biological] parents” and therefore the state incest statute did not apply). That case was overruled by the Indiana Supreme Court three years later. See *Bohall v. State*, 546 N.E.2d 1214, 1215-16 (Ind. 1989) (holding that “natural parents whose children ha[ve] been adopted [are not excluded] from the prohibitions of the incest statute”).

<sup>199</sup> In *Young v. Reno*, for instance, the Ninth Circuit held that the Immigration and Nationalization Service (“INS”) did not abuse its discretion by denying a woman’s visa petition on behalf of her biological siblings because it was proper to conclude, as the INS did, that siblings’ relationship to each other derived from their relationship to a common parent or parents. The petitioner’s adoption into a different household, the INS reasoned, severed her relationship to those common parents, thereby destroying the sibling relationship as well. *Young v. Reno*, 114 F.3d 879, 881 (9th Cir. 1997).

<sup>200</sup> See, e.g., *La Bove v. Metro. Life Ins. Co.*, 264 F.2d 233, 235 (3d Cir. 1959) (observing that “if the natural parent and the natural child should marry after the natural child has been adopted by somebody else, we cannot think that the marriage would be any less incestuous because of the adoption”); *State v. Holden*, 429 A.2d 1321, 1323 (Del. Super. Ct. 1981) (applying incest statute to half brother and half sister whose legal relationship had been terminated by the sister’s adoption into a new family); *State v. J.R.*, No. E2007 01775 COA R3 CV, 2008 Tenn. App. LEXIS 306, at \*12 (May 21, 2008) (finding that “siblings retain the status of brother and sister for purposes of the incest statute even if their parents’ parental rights are terminated and one of the siblings is later adopted”); see also Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1141 (2003) [hereinafter *Perfect Substitutes*] (observing that when Massachusetts amended its adoption statute in 1867 to include marriages between a child and her adoptive parent, the state “clarified that, although

conceived individuals who descend from a common biological progenitor might be considered siblings, even though they lack any other relationship to each other and even though their biological progenitor lacks any other relationship to either of them.

Of course, that individuals can be considered family members in one context (incest statutes) but not in another (immigration law) reveals just how contingent and provisional the legal category of “family” is in the first place. Indeed, who qualifies as “family” depends on a normative understanding of what family “ought to be” in any particular context rather than on a descriptive reflection of what family “is” in some absolute and invariant sense. To say that blood-related individuals qualify as family members in one setting but not in another is to recognize that “family and familial roles are not preordained, natural categories.”<sup>201</sup> Rather, they are legally, culturally, and socially “contingent.”<sup>202</sup>

Even more, it is no surprise that in the above-mentioned examples individuals were considered “family” for the purpose of a restrictive incest law and only for that purpose. As this Article has argued, the purpose of the incest prohibition is to establish kinship.<sup>203</sup> Thus understood, it is unremarkable that a person would be considered a legal stranger to someone else for all purposes *except* for incest.

The contemporary incest prevention argument is the product of a normative choice to view — and establish — donor-conceived individuals as “family” members. Cahn, the leading academic exponent of that argument, is aware of its normative dimension. She recognizes that “the elements of the crime [of incest] may . . . depend on the definition of family.”<sup>204</sup> She also recognizes that “[p]hrasing a connection [between donor-conceived individuals] in familial terms, such as sibling, rather than biological terms, such as shared genetic material, *already suggests the appropriate legal and cultural frameworks.*”<sup>205</sup> In other words, she recognizes that by “using the

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the adopted child was otherwise severed from her biological parents, this was inapplicable concerning ‘marriage, incest, or cohabitation’”).

<sup>201</sup> Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 593 n.12 (2013) [hereinafter *Staging the Family*].

<sup>202</sup> *Id.* at 592.

<sup>203</sup> For instance, it is the incest prohibition that normalizes and naturalizes adoptive familial relationships, which, as Cahn has shown, become more “like” biological familial relationships once they become subject to an incest law. See Cahn, *Perfect Substitutes*, *supra* note 200, at 1143.

<sup>204</sup> Cahn, *Accidental Incest*, *supra* note 4, at 62.

<sup>205</sup> Cahn, *The New Kinship*, *supra* note 8, at 380 (emphasis added). Other proponents of the incest prevention rationale have been even more insistent about

language of family” in the donor context, she is inviting the law in, including the law of incest.<sup>206</sup>

But that is precisely Cahn’s objective. In her recent book on donor-conceived communities, *The New Kinship: Constructing Donor-Conceived Families*,<sup>207</sup> as well as in the law review article that preceded it,<sup>208</sup> Cahn advocates a re-conceptualization of the donor community in familial terms as well as the enactment of regulations that recognize, respect, and facilitate the donor community’s desire for familial connection.<sup>209</sup> Cahn argues that alternative reproduction creates people who exist in “familial” networks but that the law has failed to “respect” them as such because of two conceptual flaws: first, the use of a medical model rather than a family law model to evaluate alternative reproduction;<sup>210</sup> and second, the privileging of the privacy/

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using the language of family to conceptualize donor communities, referring to sperm donors as “fathers” and to egg donors as “mothers.” See *infra* notes 245–47 and accompanying text. Recent empirical evidence suggests that sperm donors, but not egg donors, think of themselves in parental/familial terms. See RENE ALMELING, *SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM* 145, 149 (2011). Almeling reports that “[m]ost sperm donors define themselves as fathers to children born of their donations,” *id.* at 145, whereas “[m]ost egg donors, who have exactly the same genetic relationship to offspring as sperm donors, come to the opposite conclusion: they are not mothers.” *Id.* at 149. Almeling’s empirical findings contrast with the image of sperm and egg donors that often surfaces in commentary about gamete donation, which tends to conceptualize egg donors as maternal and sperm donors as mere facilitators of conception. See, e.g., Noa Ben Asher, *The Curing Law: On the Evolution of Baby Making Markets*, 30 CARDOZO L. REV. 1885, 1910 (2009) (discussing a court decision characterizing a sperm donor as someone who provides “merely a gamete”) (citation omitted); Kimberly D. Krawiec, *Marketization and Families: A Woman’s Worth*, 88 N.C. L. REV. 1739, 1757–65 (2010) (discussing the sex stereotypes that accompany proposed regulatory reform of egg donation).

<sup>206</sup> CAHN, *NEW KINSHIP*, *supra* note 7, at 8. Even so, Cahn sometimes places smart quotes around familial terms when they reference individuals involved in the gamete donor network — “father” for sperm donor, “parents” for gamete donors, “children” for donor conceived individuals. In so doing, she suggests that those persons are not “real” or “true” relatives. *Id.* at 32–33, 86; Cahn, *The New Kinship*, *supra* note 8, at 415.

<sup>207</sup> CAHN, *NEW KINSHIP*, *supra* note 7 (advocating for the enactment of law that recognizes the donor community’s desire for familial connection).

<sup>208</sup> Cahn, *The New Kinship*, *supra* note 8.

<sup>209</sup> Some of those relationships are “sibling” in nature, as when one gamete donor helps to create several children who feel (and desire) a “sibling” connection with other children conceived from the same donor. See CAHN, *NEW KINSHIP*, *supra* note 7, at 129 (stating that “members of the donor community should be able to find out the identity of their donors and their biologically related ‘siblings’”). Other relationships are “parent/child” in nature, as when a gamete donor helps to create a child who, in time, desires identifying information about her unknown “mother” or “father.”

<sup>210</sup> See CAHN, *NEW KINSHIP*, *supra* note 7, at 175; Cahn, *The New Kinship*, *supra* note 8, at 373.

autonomy interests of alternative reproduction's users above the familial/relational interests of its eventual creations.<sup>211</sup> Cahn calls for the replacement of this "medical" model of alternative reproduction with a "family law" model — for "the paradigm shift away from viewing donor-conceived families and their communities as scientific and medical constructs and instead viewing them as relational entities."<sup>212</sup> Cahn's suggested legal interventions are explicitly grounded in a *familial* conception of the donor network. She says in her book: "This guidance provides the basis for the recommendations developed in the next two chapters, which focus on additional regulation of the fertility industry and further facilitation of the integrity of the family networks."<sup>213</sup> The incest prevention rationale is just one aspect — albeit a key aspect, as it is the initial legal mechanism that conceptualizes the donor network in familial terms — of this larger project of establishing the donor community as a family.

Importantly, the "paradigm shift" in social norms that Cahn envisions might itself amount to establishment. As Clare Huntington has argued, "social norms often play a far more important, and certainly more pervasive, role in shaping familial behavior than direct legal regulation."<sup>214</sup> Moreover, the state shapes and influences social norms about the family in "unseen" or invisible ways all the time,<sup>215</sup> Huntington writes, from enacting infant safe haven laws and mandatory ultrasound laws to advocating for marriage equality.<sup>216</sup>

<sup>211</sup> See Cahn, *The New Kinship*, *supra* note 8, at 373.

<sup>212</sup> CAHN, *NEW KINSHIP*, *supra* note 7, at 137.

<sup>213</sup> *Id.* at 134 (emphasis added).

<sup>214</sup> Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1115 (2010) [hereinafter *Familial Norms and Normality*]; see also Huntington, *Staging the Family*, *supra* note 201, at 608 n.90 (stating that "[s]ocial norms play a central role in regulating family life").

<sup>215</sup> Huntington, *Familial Norms and Normality*, *supra* note 214, at 1114. Like Huntington, other scholars have discussed the law's power to shape social norms, particularly in the family law area. See Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1380 (2009); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1259 (2009); Camille Gear Rich, *Innocence Interrupted: Reconstructing Fatherhood in the Shadow of Child Molestation Law*, 101 CALIF. L. REV. 609 *passim* (2013); Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 518 19 (1992). Social norms, like the law that shapes them, are often invisible. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 912 (1996) (observing that "when social norms appear not to be present, it is only because they are so taken for granted that they seem invisible").

<sup>216</sup> See Huntington, *Familial Norms and Normality*, *supra* note 214, at 1134 46. The legal regulations surrounding reproduction buttress "a social norm that stigmatizes

Indeed, the state is a social norm “entrepreneur”<sup>217</sup> writ large, and those social norms can have the effect of “establishing” the family no less than — and perhaps even more than — direct regulation.<sup>218</sup>

Thus understood, the incest prevention justification establishes the family as much by the social norms that it creates — inviting, if not effectively forcing, all individuals in the donor network to think of themselves in familial terms — as by the direct regulation that it could precipitate. In this sense, the incest prevention justification coheres and coincides with another leading rationale for regulating alternative reproduction: protecting a child’s “right to know” her genetic progenitors.<sup>219</sup> “Right to know” arguments derive from a medically dubious condition — “genealogical bewilderment” — that might very well create the very conditions of yearning that it purports to diagnose.<sup>220</sup> Like the incest prevention justification, the “right to know” argument assumes (and, in the process, solidifies) the existence of familial and genetic connection — even in cases where no such connection exists but for the argument itself. Indeed, at the “heart” of

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the choice to have an abortion.” *Id.* at 1136.

<sup>217</sup> Sunstein, *supra* note 215, at 909 (referring to a certain class of people as “norm entrepreneurs,” that is, “people interested in changing social norms”).

<sup>218</sup> For the relationship between state sanctioned social norms and familial establishment, see Courtney Megan Cahill, *Regulating at the Margins: Non Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 67-70 (2012) [hereinafter *Regulating at the Margins*].

<sup>219</sup> See, e.g., Naomi Cahn, *Children’s Interests and Information Disclosure: Who Provided the Egg and Sperm? Or Mommy, Where (and Whom) Do I Come From?*, 2 GEO. J. GENDER & L. 1, 5 (2001) (arguing that “disclosure recognizes the potential relationship between the child and her forebears”); Cahn, *The New Kinship*, *supra* note 8, at 416 (characterizing donor conceived children’s interest in obtaining identifying information about their biological progenitors as a “right to know”); Lucy Frith, *Gamete Donation, Identity, and the Offspring’s Right to Know*, 9 AM. MED. ASS’N J. ETHICS 644, 644-45 (2007).

<sup>220</sup> See, e.g., John Lawrence Hill, *What Does It Mean to Be a “Parent”? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 404 (1991) (arguing that the claim that children are harmed when they lack information about their genetic identity “appears to confuse the psychological notion of self identity with the relatively more superficial knowledge of one’s biological legacy” and criticizing this view for being “not only dubious empirically but also an atavistic throwback to the priority of blood ties over all else as a determinant of one’s sense of self”); Kimberly Leighton, *Addressing the Harms of Not Knowing One’s Heredity: Lessons from Genealogical Bewilderment*, 3 ADOPTION & CULTURE 64, 66 (2012) (stating that “the diagnosis of ‘genealogical bewilderment’ is itself generative of the very conditions of such suffering” and that “the reasoning behind genealogical bewilderment produces the very phenomenon it believes itself to be explaining”); Iain Walker & Pia Broderick, *The Psychology of Assisted Reproduction or Psychology Assisting Its Reproduction?*, 34 AUSTRALIAN PSYCHOLOGIST 38, 39-40 (1999).

both arguments “is a foundational commitment to a particular view of what a family is and, based on this view, a judgment as to what a *good* family is.”<sup>221</sup>

Finally, and importantly, the incest prevention justification establishes not just donor networks in familial terms, but also the family in genetic terms. The only reason to conceptualize donor networks in relational/familial terms — and, therefore, to apply the laws of incest to them — is because of “the genetic tie” that some of the persons in those networks share.<sup>222</sup> Applying the paradigmatic law of the family to the donor-conceived setting reinforces the prominence — the primacy even — of genes in defining who our “true” family is.<sup>223</sup> In fact, what Cahn sees as “the new kinship” is a relationship defined solely by biology and genes, and therefore not so new at all.

#### V. NORMATIVE AND CONSTITUTIONAL CRITIQUE

The foregoing Parts presented the incest prevention rationale, offered a theory for what is motivating it, and teased out the more specific ways in which that rationale establishes the family in the alternative reproduction context. Part V now turns to the reasons why we ought to reject that rationale as a basis for regulating alternative reproduction; each of these reasons relates to the familial establishment discussed in Part IV. Section A argues that the incest prevention justification ought to be rejected because it reflects and reproduces familial norms that not only encourage or nudge individuals in the donor network to conceptualize themselves in familial terms (when they might very well prefer to exist as legal strangers), but also are out of sync with the image of kinship that emerges from contemporary family and marriage equality law. Section B argues that the incest prevention justification ought to be rejected because it disrupts the trend in American constitutional law toward greater familial autonomy and familial self-determinism; it also conflicts with a key principle advanced by recent marriage equality jurisprudence — familial disestablishment — and is part and parcel of

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<sup>221</sup> Leighton, *supra* note 220, at 65–66.

<sup>222</sup> See Roberts, *supra* note 37, at 210–11.

<sup>223</sup> See Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347, 386 (2008) (observing that “[t]he connection among donor siblings or between a donor and the children produced from his sperm is not even grounded in family narratives about a family that once was. The existence of a family is suggested only by suppositions about shared DNA”).



a larger regulatory attempt to graft the same logic that long supported marriage inequality onto the law of reproduction.

A. *Normative Critique*

The incest prevention justification reflects and reproduces norms about the family that channel individuals in the donor network to think of themselves in familial terms and that conflict with the more fluid image of kinship that has emerged from contemporary family law jurisprudence. As such, the incest prevention justification warrants critique not just because it forces individuals to conform to a particular familial norm but also because it allows a particular familial norm to flourish at all.

Part IV argued that the incest prevention justification establishes the family in a variety of ways, including through the dissemination of norms about the donor-network that encourage individuals to think of themselves in familial terms. Scholars have long recognized family law's "channeling function," first identified as such by Professor Carl Schneider in an influential article dedicated to the panoply of ways in which family law supports its preferred kinship models — including biological, dual-gendered parenthood<sup>224</sup> — and nudges individuals into conforming to them. Since Schneider's seminal piece was published in 1992, scholars have identified countless examples of family law's channeling project, from the parental performances that the law so often encourages (if not demands) parents to satisfy<sup>225</sup> to the sexual and intimate relationships into which the state attempts to direct its citizens.<sup>226</sup> Even when the law recognizes and protects non-traditional intimacy and family formation — as when the Supreme Court decided *Lawrence v. Texas*, which established a constitutionally-grounded liberty right to "certain" sexual conduct between two members of the same sex<sup>227</sup> — it is engaged in channeling work.<sup>228</sup> In

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<sup>224</sup> Schneider, *supra* note 215, at 501 02 (arguing that the law "might posit an institution of 'parenthood' with several key normative characteristics. Parents should be married to each other. They are preferably the biological father and mother of their child").

<sup>225</sup> See, e.g., Huntington, *Familial Norms and Normality*, *supra* note 214, at 1112 14 (providing several examples of instances when the state attempts to influence families by enacting legal rules that have indirect effects); Huntington, *Staging the Family*, *supra* note 201, at 618 21 (citing cases regarding demands of parental performances).

<sup>226</sup> See Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809, 813 18 (2010).

<sup>227</sup> *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

<sup>228</sup> Rosenbury & Rothman, *supra* note 226, at 829 (arguing that "the *Lawrence*

fact, some might say that the law's channeling impulse is at its height during such moments.<sup>229</sup>

The incest prevention justification for regulating third-party gamete donation represents the most recent chapter in family law's "channeling story."<sup>230</sup> Just as the law of divorce shapes spouses' conduct and identities during an intact marriage,<sup>231</sup> and just as *Lawrence v. Texas* shapes and "channels all sex" into "one marriage-like form,"<sup>232</sup> so too does the incest prevention justification channel individuals in the donor network into a particular familial model — the biological family — by encouraging them to situate themselves within that model. In this sense, the same channeling impulse that has motivated the regulation of intimate and family relations in myriad other settings — the criminal law, the law of divorce — is making its presence felt in the law of alternative reproduction, an area which is already inflected by "cultural understandings of biological sex differences as well as gendered expectations of women and men."<sup>233</sup> Indeed, to regulate alternative reproduction on the basis of a taboo whose very purpose is to create "heterosexual desire and discrete gender identity,"<sup>234</sup> and which has been used throughout the history of American law to achieve that purpose, would perpetuate the channeling impulse that motivates so much of the law surrounding intimate and familial relations — including, increasingly, the law of alternative reproduction.

To be sure, it may very well be true that individuals involved in alternative reproduction already think of themselves in familial terms.

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model for protecting sexual conduct is problematic not only because it channels gay sex into one marriage like form, but also because it channels all sex into such a form"); see also *id.* at 835 (arguing more generally that "[b]y promoting one vision of intimacy — that of a couple engaged in emotional *and* sexual intimacy — the law ignores those individuals whose lives do not conform to [a] narrow definition of intimacy and reinforces incentives for others to structure their lives in ways that embrace that definition" (emphasis added)).

<sup>229</sup> See Cahill, *Same Sex Marriage, Slippery Slope Rhetoric*, *supra* note 3, at 1605–06.

<sup>230</sup> See Rosenbury & Rothman, *supra* note 226, at 839.

<sup>231</sup> See Schneider, *supra* note 215, at 502.

<sup>232</sup> Rosenbury & Rothman, *supra* note 226, at 829.

<sup>233</sup> ALMELING, *supra* note 205, at 2. Almeling uncovers the gendered scripts which influence both the law of, and the culture surrounding, alternative reproduction. Her research reveals the highly gendered framework in which gamete banks and their employees operate. She states: "[W]omen donating eggs [are] perceived as altruistic helpers who want nothing more than for recipients to have families, while men donating sperm [are] construed as employees performing a job with little care for the bank's customers." *Id.* at 10.

<sup>234</sup> BUTLER, *GENDER TROUBLE*, *supra* note 130, at 97.

For instance, one outspoken user of anonymous gametes and her son, Wendy and Ryan Kramer, together maintain a database, called *The Donor Sibling Registry*, which allows individuals to search for “siblings” conceived from the same gamete donor.<sup>235</sup> The Kramers explicitly conceptualize the relationships that exist between individuals conceived from the same gametes (but raised in different families) in familial terms (as “siblings”<sup>236</sup>), as do other donor-conceived children,<sup>237</sup> scholars,<sup>238</sup> and many gamete donors themselves.<sup>239</sup> Viewed from the perspective of these individuals, the incest prevention justification accurately — and rightly — captures the familial ties that exist between donors and their offspring as well as between donor-conceived children.

At the same time, though, it is also likely true that not all donor-conceived children approach other members of the donor network in this way. For instance, the Institute’s survey of donor-conceived children, *My Daddy’s Name is Donor*, asked children conceived from donor gametes “Which word(s) or term(s) best describe what the phrase ‘sperm donor’ means to you? (check all that apply).”<sup>240</sup> Fifty-five respondents answered “donor,” 32 answered “seed giver,” and 32 answered “contributor of genetic material.” By contrast, only 14 answered “father,” 26 “biological father,” 8 “other father,” 7 “Dad/Daddy,” and 26 “genetic father.”<sup>241</sup>

In addition, the coercive character of social norms renders it difficult to isolate these individuals’ preferences apart from those norms. Even if all donor-conceived children did conceptualize their gamete donors as well as other offspring from the same donor in familial terms, that could very well be the result of social norms — the

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<sup>235</sup> *Our History and Mission*, DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com/about/dsr/history-and-mission> (last visited Sept. 4, 2015).

<sup>236</sup> As argued earlier, it is by no means clear that the law (at least) treats these individuals as “siblings,” which denotes a legal (as well as a social) relationship that exists between individuals who descend from a common ancestor. *See supra* notes 190–200 and accompanying text.

<sup>237</sup> *See, e.g.*, Alana S. Newman, *Children’s Rights or Rights to Children?*, WITHERSPOON INST. (Nov. 10, 2014), <http://www.thepublicdiscourse.com/2014/11/13993/> (discussing her experience as a child of donor gametes).

<sup>238</sup> *See, e.g.*, CAHN, *NEW KINSHIP*, *supra* note 7, at 137 (using the language of family to address individuals conceived from the same gametes but raised in different households).

<sup>239</sup> *See, e.g.*, ALMELING, *supra* note 205, at 145 (summarizing the findings of her research that sperm donors tend to think of themselves in paternal terms).

<sup>240</sup> MARQUARDT, GLENN & CLARK, *supra* note 54, at 91.

<sup>241</sup> *Id.*

social norms that both flow from legal regulation (and the reasons for it, like incest prevention) and are reproduced by that regulation.

A useful analogue here is adoption and the role that social norms play in adoptees' quest for their biological progenitors. "Adoptees almost always search for their birth mother first and their birth father, if at all, only after they have found their birth mother," Katharine Baker writes.<sup>242</sup> "If identity is about being rooted in one's genealogical past," she asks, "why do adoptees seem to care more about their mothers?"<sup>243</sup> Baker concludes by suggesting that "cultural scripts" about maternity and paternity could be playing "a huge role" in adoptees' gendered preferences vis-à-vis the search for their biological progenitors.<sup>244</sup>

Social norms and "cultural scripts" about the family — and, specifically, about the paradigmatic nuclear, biologically-bound family — are no less powerful in the law of alternative reproduction than they are in the law of adoption.<sup>245</sup> The more that law, policy, and culture conceptualize the donor network in familial terms — by, among other things, labeling the relationships that could exist within that network in terms of "incest" — the more likely it is that children conceived in these networks will conceptualize their donors in familial terms. The idea that a sperm donor is indistinguishable from a father pervades American culture; from publications like *My Daddy's Name Is Donor*, which obliterates the boundary between donor and father, to films like *The Switch*, where biological paternity's gravitational pull leads the film's "sperm-donor-turned-father" and son (and mother) into a traditional domestic tableau,<sup>246</sup> we are constantly being told that sperm donors are "fathers" — even by relatively liberal media outlets like *The New York Times*, which recently referred to anonymous sperm donation in paternal terms.<sup>247</sup>

But the normative critique considered here extends beyond the channeling effect that the incest prevention justification could have on individuals involved in alternative reproduction, be they donors,

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<sup>242</sup> Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 690 (2008).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*; see ALMELING, *supra* note 205 *passim*.

<sup>246</sup> Stephen Holden, *In a Baste and Switch, a New Father Is Born*, N.Y. TIMES (Aug. 19, 2010), <http://www.nytimes.com/2010/08/20/movies/20switch.html>.

<sup>247</sup> Mroz, *supra* note 48 (stating that "there is growing concern among parents, donors and medical experts about potential negative consequences of having so many children *fathered* by the same donors" (emphasis added)).

recipients, or donor-conceived offspring. Rather, or in addition, this critique maintains that the incest prevention justification ought to be rejected because it allows certain familial norms to flourish at all. Regardless of the incest prevention justification's potentially coercive effect on donor-conceived children (and on other individuals involved in third-party gamete donation), that justification rests on familial norms that are out of sync with — and quite possibly undermine — the image of kinship that emerges from contemporary family law and marriage equality jurisprudence.

More specifically, family law's once-dominant model of parenthood based on "formal markers such as biology, gender, sexual orientation, and even marriage" has gradually been displaced by a model of social parenthood based on function, conduct, and intent.<sup>248</sup> As Doug NeJaime has recently argued, courts in the 1990s and 2000s started to recognize the importance of intent and conduct in establishing parentage; as they did so, "the biological connection" between parent and child "receded in importance."<sup>249</sup>

In one case,<sup>250</sup> the California Supreme Court held that a man who had undertaken the responsibilities of parenthood but who was neither married to the legal mother of the child whom he cared for, nor the biological progenitor of that child, could qualify as a legal parent under the Uniform Parentage Act provision that conferred parental rights on men who "receive[d] a child into [their] home[s] and openly h[eld] the child out as [their] natural child."<sup>251</sup> The court's analysis in that case suggests that "the meaning of 'natural' [was] contingent, capable of describing a functional, rather than biological, parent, especially in service of the privatization of support."<sup>252</sup> Similarly, in a trilogy of cases decided by the California Supreme Court in 2005,<sup>253</sup> unmarried lesbian mothers, two of whom bore no biological relationship to their children, were deemed legal parents of those children because they intended to raise them as their own and

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<sup>248</sup> Douglas NeJaime, *Marriage Equality and the New Parenthood*, HARV. L. REV. [hereinafter *Marriage Equality*] (forthcoming 2016) (manuscript at 30) (on file with author).

<sup>249</sup> *Id.* at 20.

<sup>250</sup> *In re Nicholas H.*, 28 Cal. 4th 56, 70 (2002) (accepting a non biological father's legal parentage under section 7611(d) of California's Parentage Act on the ground that he held himself out as the child's father and functioned in the capacity of the child's father).

<sup>251</sup> *Id.* at 58, 63.

<sup>252</sup> NeJaime, *Marriage Equality*, *supra* note 248, at 24.

<sup>253</sup> *Elisa B. v. Superior Court*, 37 Cal. 4th 108, 113 (2005); *K.M. v. E.G.*, 37 Cal. 4th 130, 144 (2005); *Kristine H. v. Lisa R.*, 37 Cal. 4th 156, 166 (2005).

did, in fact, raise them as their own.<sup>254</sup> These and other cases suggest that courts have been “embrac[ing] intentional and functional parenthood” for decades, both within the LGBT family law arena and beyond it.<sup>255</sup>

Social parenthood has flourished as a familial norm no less in contemporary marriage equality jurisprudence than it has in recent family law jurisprudence; in fact, “marriage equality routes” the intentional and functional concepts of parentage that underwrite LGBT family law jurisprudence “into an LGBT-inclusive model of marriage, pushing intentional and functional parenthood from the margins to the mainstream.”<sup>256</sup> Federal courts around the country have grounded their marriage equality rulings in the social relationships that exist between same-sex couples and their children, not in the biological or genetic ties that might bind them. As NeJaime writes, the entire marriage equality project “pushes against biological procreation and gender differentiation and instead centers intentional and functional parenthood.”<sup>257</sup>

For instance, in *Baskin v. Bogan*, which upheld two federal district court rulings in favor of marriage equality,<sup>258</sup> Judge Posner dismissed Wisconsin and Indiana’s stated rationale for their states’ marriage prohibitions, namely, “to encourage child-rearing environments where [biological] parents care for their biological children in tandem.”<sup>259</sup> “Why the qualifier ‘biological’?” Judge Posner queried.<sup>260</sup> “[F]amily is about raising children and not just about producing them,” he continued.<sup>261</sup> As NeJaime writes, the *Baskin* court “centered functional parenting over procreative sex, gender, and biology.”<sup>262</sup> Other courts have made similar observations, noting that “the parentage statutes [in California] place a premium on the ‘social relationship,’ not the ‘biological relationship,’ between a parent and a child”<sup>263</sup> and that

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<sup>254</sup> For a discussion of these cases and the California Supreme Court’s reasoning, see NeJaime, *Marriage Equality*, *supra* note 248, at 25–31.

<sup>255</sup> *Id.* at 30.

<sup>256</sup> *Id.* at 38.

<sup>257</sup> *Id.* at 32.

<sup>258</sup> *Baskin v. Bogan*, 766 F.3d 648, 672 (7th Cir. 2014).

<sup>259</sup> *Id.* at 663.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> NeJaime, *Marriage Equality*, *supra* note 248, at 37.

<sup>263</sup> *Perry v. Brown*, 671 F.3d 1052, 1087 (9th Cir. 2012), *vacated*, 133 S. Ct. 2652 (2013).

“biological relationships are not [the] exclusive determina[nt] of the existence of a family.”<sup>264</sup>

The incest prevention justification is in tension with the norm of social kinship that has emerged from recent family law and marriage equality jurisprudence in at least two ways. First and more generally, that justification is rooted in a taboo whose routine deployment in American law usually signals a desire to shore up a biologically-grounded kinship norm: married heterosexual parents and their biologically-related children, sexually conceived.<sup>265</sup> Second and more concretely, that justification could help to re-establish biological kinship as a dominant familial norm by making it more difficult for social kinship to exist, let alone to flourish. Not only does the incest prevention justification center kinship around biology and encourage non-traditional procreators (and their offspring) to think about the families they create (and are born into) in biological terms, but it could, if successfully implemented — that is, if used to enact burdensome restrictions on alternative reproduction, as it has in non-domestic jurisdictions — render non-biological kinship a less available option for individuals who rely on alternative reproduction as a vehicle of kinship formation.

### B. Constitutional Critique

The incest prevention justification disrupts the trend in American constitutional law toward greater familial autonomy and familial self-determinism — a movement reflected in and furthered by contemporary marriage equality jurisprudence. On this view, the incest prevention justification is not just normatively undesirable but also constitutionally deficient.

No less than it reflects the “extension of constitutional rights and protections to people once ignored or excluded,”<sup>266</sup> the arc of constitutional history reflects a movement toward greater autonomy in matters of intimate and family life. In the 1960s and 1970s, the Supreme Court recognized the right of both married couples and single persons to enter into and maintain non-procreative sexual relationships<sup>267</sup>, including the marital relationship, as well as a limited

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<sup>264</sup> *Kitchen v. Herbert*, 755 F.3d 1193, 1214 (10th Cir. 2014) (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977)).

<sup>265</sup> See *supra* notes 174–82 and accompanying text.

<sup>266</sup> *United States v. Virginia*, 518 U.S. 515, 557 (1996).

<sup>267</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that the Fourteenth Amendment’s Equal Protection Clause prohibits the government from treating single

right of familial self-determination. As the Court declared in *Moore v. East Cleveland*: “the Constitution prevents [government] from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.”<sup>268</sup>

Even before those transformative years, the Court recognized that constitutional liberty “denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, [and to] establish a home and bring up children”<sup>269</sup> as well as that “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children.”<sup>270</sup> Moreover, since those transformative years, the Court has articulated an even more robust liberty right in intimate and family matters, reasoning in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment,”<sup>271</sup> and in *Lawrence v. Texas* that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>272</sup>

Familial rights “have been accorded shelter” not only “under the Fourteenth Amendment’s Due Process Clause”<sup>273</sup> but also under the First Amendment’s implied right of intimate association,<sup>274</sup> the First

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persons and married persons differently with respect to their respective decisions to use contraception); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that the Fourteenth Amendment’s Due Process Clause protects a right to marital privacy that prohibits the government from criminalizing married persons’ use of contraception).

<sup>268</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (plurality opinion).

<sup>269</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>270</sup> *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925).

<sup>271</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

<sup>272</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>273</sup> *Moore*, 431 U.S. at 501.

<sup>274</sup> See, e.g., Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 654 (1980). Karst argues that as of the date of his article, “the Supreme Court ha[d] decided about fifty cases” striking down laws that unduly burden intimate and familial life; these cases, he suggests, converge “on a single theme: the freedom of intimate association.” *Id.* at 625. “[T]he constitutional doctrines that have nurtured the freedom of intimate association,” he continues, include “the First Amendment, equal protection, and substantive due process.” *Id.* The case that best illustrates the First Amendment dimensions of intimate association is *Griswold v. Connecticut*, which described the right at issue there—marital privacy—in associational terms.



and Fourteenth Amendments' implied prohibition on familial establishment,<sup>275</sup> and the Fourteenth Amendment's anti-stereotyping principle.<sup>276</sup> An emerging scholarly view maintains that the Constitution prohibits government from "encourag[ing] or discourag[ing] certain kinds of familial relationships"<sup>277</sup> no less than it prohibits government from establishing religion. As Melissa Murray and Alice Ristroph argue, "the rationales for the Free Exercise and (non-) Establishment Clauses of the First Amendment support parallel principles of free exercise and nonestablishment for the family."<sup>278</sup> In a similar vein, Cary Franklin argues that contemporary Fourteenth Amendment jurisprudence — and, specifically, contemporary gay rights jurisprudence — has developed an "anti-stereotyping principle" that not only "protects against state action that reinforces stereotypes that have long incited and justified discrimination on the basis of sexual orientation," but also "prohibits demands by the government that gays and lesbians conform to particular heteronormative sex and family roles."<sup>279</sup>

Recent marriage equality jurisprudence both exemplifies and advances these constitutionally grounded anti-establishment and anti-stereotyping principles. "[T]here is little doubt that the trend in recent years [in the law of marriage] is toward a thinner form of establishment, if not disestablishment,"<sup>280</sup> Murray and Ristroph note. In just the two years since *United States v. Windsor*<sup>281</sup> struck down section 3 of the federal Defense of Marriage Act on equal protection grounds,<sup>282</sup> numerous courts, including the Supreme Court in

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*Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (describing marriage as an "association"). Karst, of course, opens his canonical article by citing to *Griswold* and its rhetoric of intimate association. Karst, *supra*, at 624.

<sup>275</sup> See David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1008-09 (2002) (applying First Amendment principles of disestablishment and free exercise to sex and gender); Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1241 (2010) (viewing the legal regulation of intimate and family life through an establishment lens).

<sup>276</sup> See, e.g., Franklin, *supra* note 23 *passim*.

<sup>277</sup> Ristroph & Murray, *supra* note 275, at 1240-41.

<sup>278</sup> *Id.* at 1240.

<sup>279</sup> Franklin, *supra* note 23, at 889.

<sup>280</sup> Ristroph & Murray, *supra* note 275, at 1270; see also Tamara Metz, *The Liberal Case for Disestablishing Marriage*, 6 CONTEMP. POL. THEORY 196, 199 (2007) (arguing that "by some accounts the establishment of marriage is weakening").

<sup>281</sup> 133 S. Ct. 2675, 2696 (2013).

<sup>282</sup> *Id.* at 2695. But see Douglas NeJaime, *Windsor's Right to Marry*, 123 YALE L.J. ONLINE 219, 220 (2013) (arguing that *Windsor* is "conceptually, if not doctrinally, a right to marry case").

*Obergefell v. Hodges*, have found that state marriage prohibitions violate constitutional equality guarantees, constitutional liberty guarantees, or both.<sup>283</sup> In many of these cases, the state attempted to justify a same-sex marriage prohibition by arguing that it furthered the state's interest in ensuring that children were raised by their biological parents in a dual-gender household<sup>284</sup> — in other words, in the type of household that the state would like to establish as the normative and legally preferred one. The state's lack of success with that justification in nearly all of the cases in which it was raised supports the arguments advanced by Murray, Ristroph, and Franklin: the law has moved toward disestablishment in domestic relations<sup>285</sup> and today “prohibits

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<sup>283</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (finding that “[t]he right of same sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws”); *Bostic v. Schaefer*, 760 F.3d 352, 367 (4th Cir. 2014) (upholding lower court decision finding Virginia’s same sex marriage prohibition unconstitutional on Equal Protection and Due Process grounds); *Bishop v. Smith*, 760 F.3d 1070, 1074 (10th Cir. 2014) (upholding district court decision striking down Oklahoma same sex marriage prohibition on constitutional grounds); *Kitchen v. Herbert*, 755 F.3d 1193, 1199 (10th Cir. 2014) (upholding district court decision striking down Utah’s same sex marriage prohibition on Due Process grounds); *Love v. Beshear*, 989 F. Supp. 2d 536, 539 (W.D. Ky. 2014) (striking down Kentucky’s same sex marriage prohibition on Equal Protection grounds); *Latta v. Otter*, 19 F. Supp. 3d 1054, 1060 (D. Idaho 2014) (striking down Idaho’s same sex marriage prohibition on Equal Protection and Due Process grounds).

<sup>284</sup> See, e.g., *Kitchen*, 755 F.3d at 1219 21 (finding that Utah’s interest in fostering biological reproduction and dual gender parenting within marriage did not justify prohibition against same sex marriage).

<sup>285</sup> Importantly, Ristroph and Murray qualify their observation that family law has moved toward disestablishment in marriage with the following statement: “Although the marital nuclear family is no longer the only acceptable model for family life, nonconforming families and family practices are often judged against the model of the marital nuclear family, further entrenching its primacy as the normative ideal for intimate life. As such, we would not characterize this trend [in marriage] as complete disestablishment.” Ristroph & Murray, *supra* note 275, at 1270 n.160. For an historical view of marriage as the measure of all relationships, see generally Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1649 50, 1654 60 (2003). Some scholars have recently provided an alternative interpretation of this conventional narrative regarding the marriage/non marriage dynamic, arguing that marriage is forged in the shadow of non marriage no less than non marriage is forged in the shadow of marriage. See, e.g., Cahill, *Regulating at the Margins*, *supra* note 218, at 47 48; Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and its Relationship to Marriage*, 102 CALIF. L. REV. 87, 162 63 (2014) (exposing the “dialogical” relationship that existed between marriage and non marriage in California’s LGBT advocacy, litigation, and jurisprudence during the 1980s and 1990s).

demands by the government that gays and lesbians conform to particular heteronormative sex and family roles.”<sup>286</sup> As in the past, so too today are courts “set[ting] limits on the state’s power to enforce a single, normative model of marriage and family.”<sup>287</sup>

In fact, marriage equality jurisprudence disestablishes not just the heterosexual family but also the biologically-bound family. Franklin is right to observe that the anti-stereotyping principle that emerges in robust form from contemporary marriage equality jurisprudence animated prior Supreme Court landmarks, including *Moore v. City of East Cleveland*,<sup>288</sup> which rejected the government’s attempt to “standardiz[e] its children and its adults by forcing all to live in certain narrowly defined family patterns.”<sup>289</sup> But it is important to remember that *Moore* extended constitutional protection only to the non-nuclear biological family, going out of its way to distinguish that case from *Village of Belle Terre v. Boraas*,<sup>290</sup> where the Court refused to extend constitutional protection to a purely functional family that lacked biological connection.<sup>291</sup> In addition, the same year that the Court decided *Moore* it decided *Smith v. Organization of Foster Families for Equality and Reform*,<sup>292</sup> which privileged the biological family even as it recognized that in some instances non-biological parents — in that case, foster parents — “hold the same place in the emotional life of the . . . child, and fulfill the same socializing functions, as a natural family.”<sup>293</sup>

In “plac[ing] a new limit on the kinds of sex and family roles the government may legitimately enforce,”<sup>294</sup> and in expanding the definition of family and parenthood beyond their traditional centering in biology,<sup>295</sup> marriage equality jurisprudence de-privileges biology as parenthood’s normative ideal — pushing beyond even landmarks like *Moore*. The direct result of decades of family law advocacy on behalf of functional, non-biological parents, the marriage equality precedent

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<sup>286</sup> Franklin, *supra* note 23, at 889.

<sup>287</sup> *Id.* at 885.

<sup>288</sup> See 431 U.S. 494, 505 06 (1977).

<sup>289</sup> *Id.* at 506.

<sup>290</sup> *Id.* at 498 (distinguishing the statute at issue in *Belle Terre* from that at issue in *Moore* on the ground that, in contrast to the former, the latter “slice[s] deeply into the family itself”).

<sup>291</sup> *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 8 (1974).

<sup>292</sup> 431 U.S. 816, 856 (1977).

<sup>293</sup> *Id.* at 844.

<sup>294</sup> Franklin, *supra* note 23, at 828.

<sup>295</sup> See NeJaime, *Marriage Equality*, *supra* note 248 *passim*.

paves the way for disestablishing not just traditional marriage but also the traditional family, understood to be the family comprised of two opposite-sex parents and their biologically-related children, sexually conceived. Indeed, that precedent not only extends relational equality to same-sex couples, but also reproductive — and family formation — equality to them.<sup>296</sup>

Thus understood, the marriage equality precedent renders the incest taboo, dependent as it is on a model of gender, sexuality, and the family that courts are rapidly discarding as the only normatively valid one, a precarious foundation on which to base the law of alternative reproduction. In *Kitchen v. Herbert*, the Court of Appeals for the Tenth Circuit embraced a robust principle of familial disestablishment, criticizing not just exclusionary marriage laws but also laws that burden an individual's constitutionally guaranteed right to “establish a family.”<sup>297</sup> In *Obergefell v. Hodges*, the Supreme Court recognized as a factual matter that “same-sex couples” have been “establish[ing] families” for decades,<sup>298</sup> and that “gays and lesbians can create loving, supporting families,” both “biological [and] adopted.”<sup>299</sup> Equally important, *Obergefell* recognized as a constitutional matter that “choices concerning . . . family relationships”<sup>300</sup> receive robust protection under the Fourteenth Amendment.

The principles of familial disestablishment and familial autonomy that emerge from *Obergefell*, *Kitchen*, and other marriage equality precedents are in serious tension with contemporary arguments for regulating reproduction that harken back to a taboo — *the* taboo — that in both theory and application is used to establish normative kinship. To anchor regulation of alternative reproduction in a taboo long used to sustain traditional, biological parenthood and heteronormative sex roles would prioritize a paradigm of intimate and familial relations that the marriage equality precedent — to say nothing of the entire marriage equality project — rejects.

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<sup>296</sup> See *id.* at 38 (arguing that courts ruling in favor of marriage equality for same sex couples have “resist[ed] distinctions between biological procreation and assisted reproduction — and thus between paradigmatic different sex and same sex families”).

<sup>297</sup> *Kitchen v. Herbert*, 755 F.3d 1193, 1199 (10th Cir. 2014).

<sup>298</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596–97 (2015).

<sup>299</sup> *Id.* at 2600.

<sup>300</sup> *Id.* at 2599.

## CONCLUSION

This Article's immediate subject has been the use of incest anxiety to regulate alternative reproduction in ways that impose significant burdens on individuals' freedom to choose whether, how, and under what conditions to procreate and "establish a family."<sup>301</sup> Its larger concern, though, is with the way in which the arguments that have been used for decades to sustain marriage inequality are being retooled in the alternative procreative setting to sustain reproductive inequality. The incest prevention justification is just one part — albeit a key part — of a larger regulatory effort by some more conservative commentators to use the law surrounding alternative reproduction to establish both the traditional family and traditional family formation. Its emergence in contemporary discussions over alternative reproduction — and why it ought to be more heavily regulated than it is currently — reminds us that the logic that animated marriage inequality for decades persists, even as courts around the country are in nearly uniform agreement over its normative and constitutional deficiencies. At the very least, the marriage equality precedent stands for the proposition that the logic used to establish the family in the past (including, but not limited to, the incest prevention justification) ought not, and likely cannot, stimulate radical legal reform of alternative reproduction — and particularly legal reform that enforces the state's normative paradigm of kinship, dampens individuals' procreative choice, and forces the thousands of individuals who rely on alternative reproduction as a vehicle of family formation to conform to the state's preferred vision of intimate and family life.

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<sup>301</sup> *Kitchen*, 755 F.3d at 1199.